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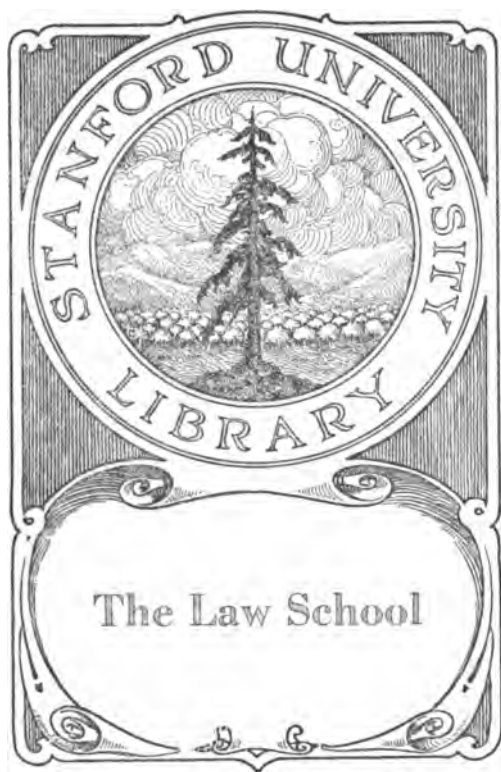
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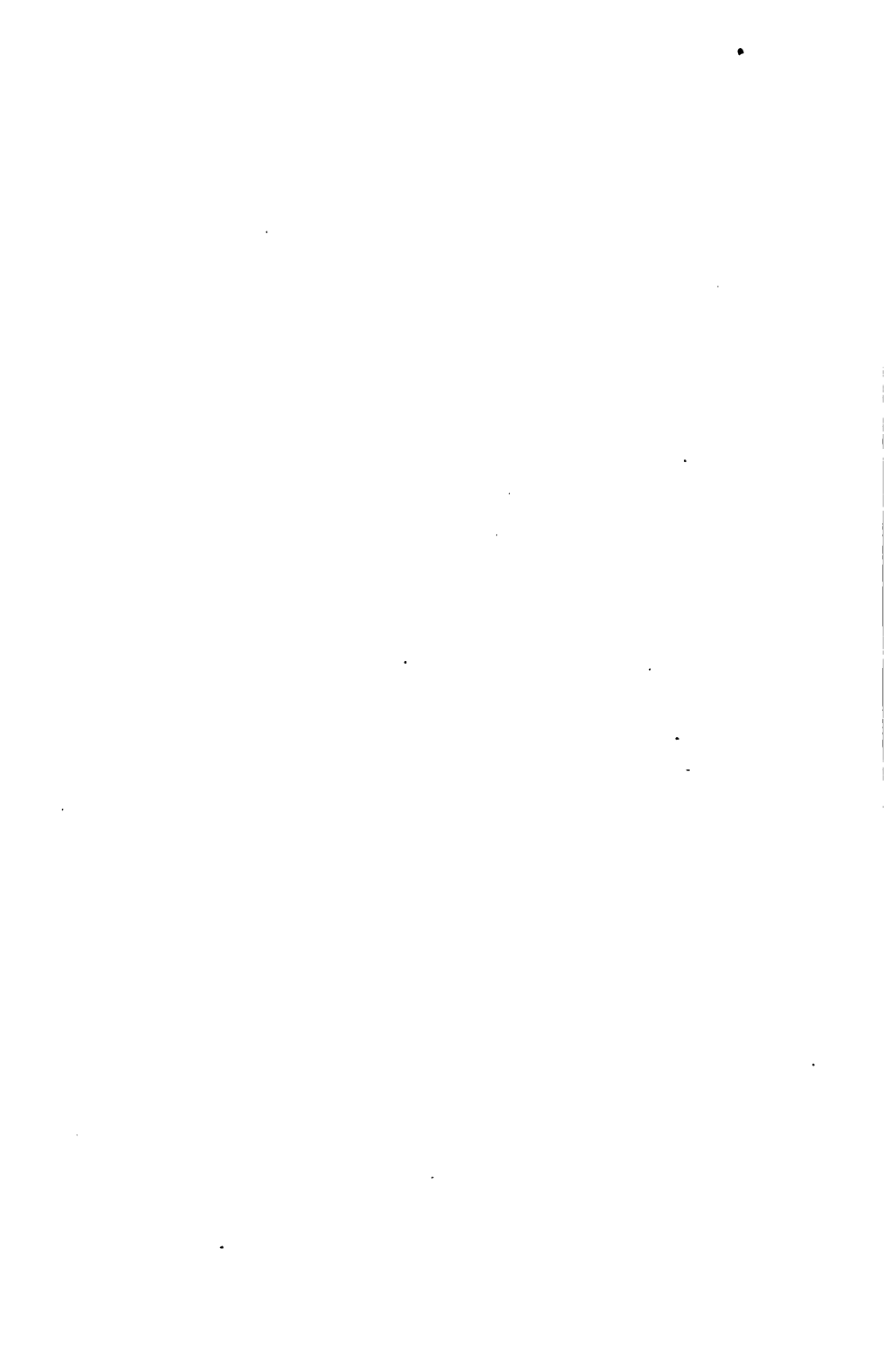


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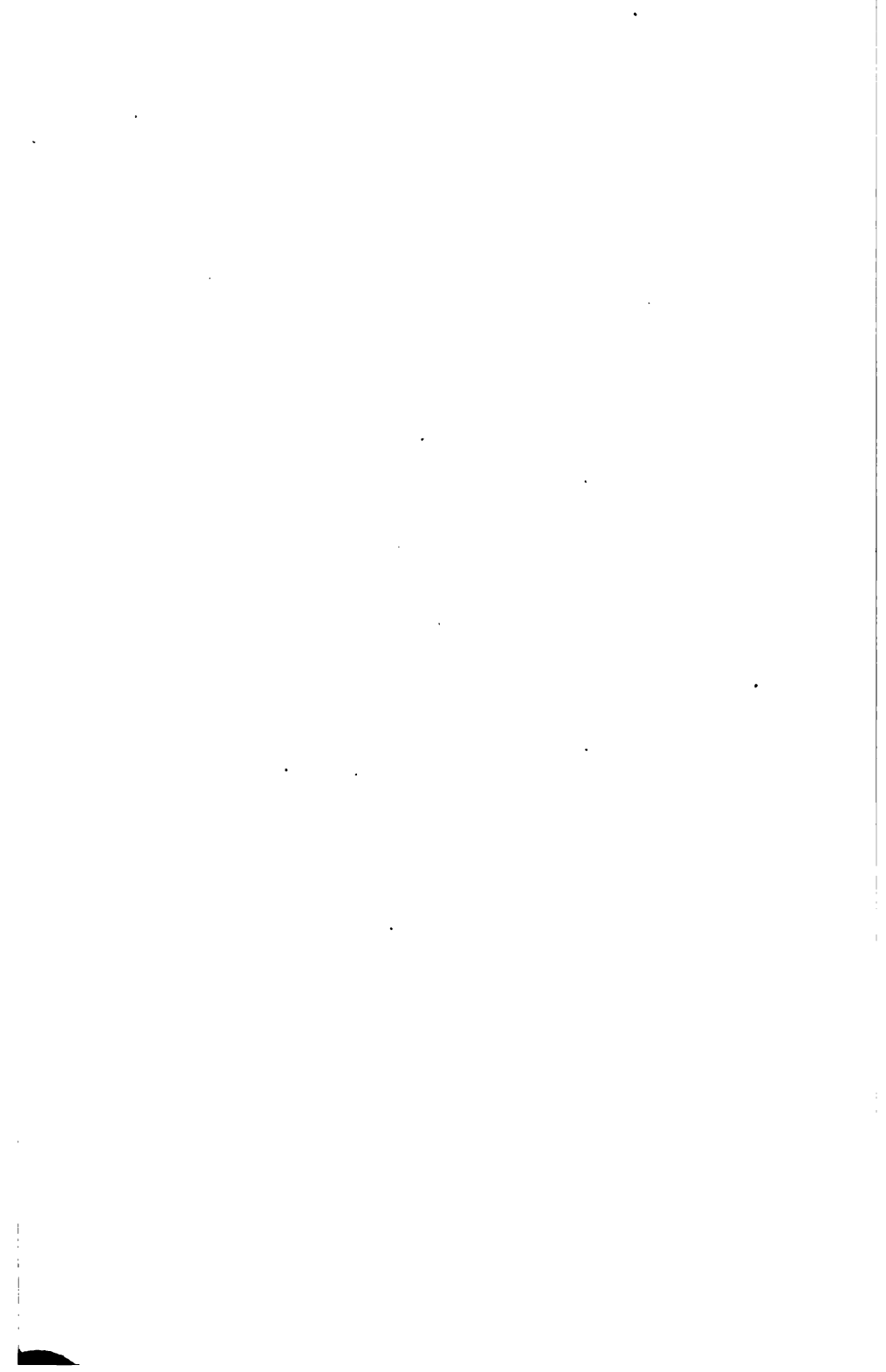
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**CASES DECIDED**

**ON THE**

**BRITISH NORTH AMERICA ACT, 1867.**



**CASES DECIDED**

ON THE

**BRITISH NORTH AMERICA ACT, 1867,**

IN

**THE PRIVY COUNCIL, THE SUPREME COURT OF  
CANADA, AND THE PROVINCIAL COURTS.**

COLLECTED AND EDITED BY

**JOHN R. CARTWRIGHT, OF OSGOODE HALL, ESQUIRE,**  
*Barrister-at-Law, and Law Clerk to the Legislative Assembly of Ontario.*

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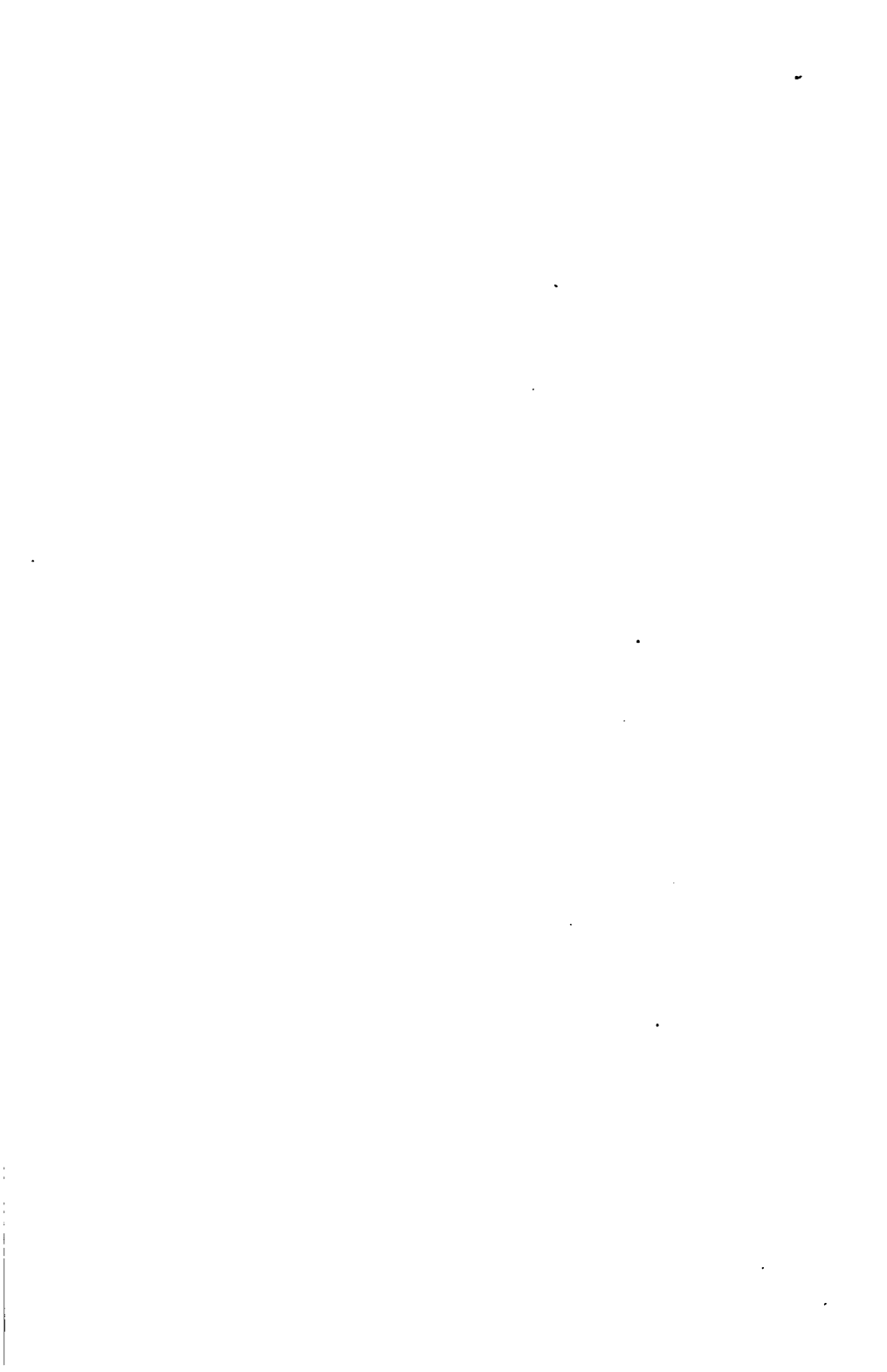
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## P R E F A C E.

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THIS work is intended to include the decisions of all the Courts which have had occasion to construe the Act.

The reported cases in the Privy Council, the Supreme Court of Canada, and the Superior Courts of Law and Equity of the Province of Ontario, are contained in the present volume. Cases in which the decisions pronounced have been appealed from and which therefore have not yet been finally disposed of are reserved for a future volume. The second volume will contain the reported cases in the Courts of the other Provinces, and cases in the Privy Council and Supreme Court the reports of which were not received in time for the present volume.

The method of arrangement adopted has been to print, first, the judgments of the Court of highest authority, and then those of the other Courts. The decisions of each Court are placed in order of time.

Where the judgments of several Courts in any case are given, the final judgment is placed first, and is printed in large type, and the judgments of the lower Courts follow in smaller type.

The heading of the pages shews the highest Court to which the case has been carried.

The Reports are taken from the Official Reports wherever this was practicable.

Most of the head-notes have been revised or entirely re-written. Where other points than the constitutional one were involved, the statement of facts has in many cases been abridged.

In no case has any omission been made in a judgment without the omission being marked by asterisks, or otherwise. The omissions are of matters not affecting the constitutional points.

Square brackets, thus [     ], shew that the words placed within them are introduced by the editor.

The quotations given in the various judgments have, as far as possible, been verified and corrected.

*June, 1882.*

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## ERRATA.

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- Page 91, note (1), for "1 Hannay 548," read "1 Hannay 556."
- " 95, last line of head note, for "ante p. 57," read "ante p. 63."
- " 111, note (1), for "Hannay 548," read "1 Hannay 556."
- " 152, note (1), for "Severn v. The Queen, 2 Can. S.C.R. 77," read "Severn v. The Queen, 2 Can. S.C.R. 70."
- " 223, note (2), for "29 U.C.C. 261," read "29 U.C.C.P. 261."
- " 355, note (2), for "De G. & S. 122," read "2 De G. & S. 122."
- " 488, head note, for second paragraph, read "The question arose on an appeal by Queen's Counsel appointed by the Lieutenant-Governor under Acts of the Provincial Legislature, the Respondent being a Queen's Counsel appointed by the Governor-General; and Strong, Fournier, and Taschereau, JJ., were of opinion that the Provincial Acts under which the Appellants were appointed were not intended to affect the precedence of Queen's Counsel appointed by the Governor-General."
- " 617, note (2), for "2 Peters 442," read "2 Peters 449."
- " 680, last line, for "Lucan v. McGlashan," read "Lucas and McGlashan."
- " 711, line 8, for "Cattle v. Ireson," read "Cattell v. Ireson."
- " 717, line 12, for "Butt v. Conan," read "Butt v. Conant."
- " 793-4, side note, for "Statement," read "Argument."



THE

# BRITISH NORTH AMERICA ACT, 1867.

(IMP. ACT 30-31 VICT., CAP. 3.)

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An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith.

[29th March, 1867.]

**W**HEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom :

And whereas such a Union would conduce to the welfare of the Provinces and promote the interests of the British Empire :

And whereas on the establishment of the Union by authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the nature of the Executive Government therein be declared :

And whereas it is expedient that provision be made for the eventual admission into the Union of other parts of British North America :

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

### I.—PRELIMINARY.

Short title.

1. This Act may be cited as "The British North America Act, 1867."

Application of provisions referring to the Queen.

2. The provisions of this Act referring to Her Majesty the Queen extend also to the heirs and successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

### II.—UNION.

Declaration of Union.

3. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that on and after a day therein appointed, not being more than six months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be one Dominion under the name of Canada; and on and after that day those three Provinces shall form and be one Dominion under that name accordingly.

Construction of subsequent provisions of Act.

4. The subsequent provisions of this Act shall, unless it is otherwise expressed or implied, commence and have effect on and after the Union, that is to say, on and after the day appointed for the Union taking effect in the Queen's Proclamation; and in the same provisions, unless it is otherwise expressed or implied, the name Canada shall be taken to mean Canada as constituted under this Act.

5. Canada shall be divided into four Provinces, named Four Provinces.  
Ontario, Quebec, Nova Scotia, and New Brunswick.

6. The parts of the Province of Canada (as it exists at Provinces of Ontario and Quebec.  
the passing of this Act) which formerly constituted respectively the Provinces of Upper Canada and Lower Canada shall be deemed to be severed, and shall form two separate Provinces. The part which formerly constituted the Province of Upper Canada shall constitute the Province of Ontario; and the part which formerly constituted the Province of Lower Canada shall constitute the Province of Quebec.

7. The Provinces of Nova Scotia and New Brunswick Provinces of Nova Scotia and New Brunswick.  
shall have the same limits as at the passing of this Act.

8. In the general census of the population of Canada Decennial census.  
which is hereby required to be taken in the year one thousand eight hundred and seventy-one, and in every tenth year thereafter, the respective populations of the four Provinces shall be distinguished.

### III.—EXECUTIVE POWER.

9. The Executive Government and authority of and Declaration of Executive Power in the Queen.  
over Canada is hereby declared to continue and be vested in the Queen.

10. The provisions of this Act referring to the Governor-General extend and apply to the Governor-General Application of provisions referring to Governor-General.  
for the time being of Canada, or other the Chief Executive Officer or Administrator for the time being carrying on the Government of Canada on behalf and in the name of the Queen, by whatever title he is designated.

11. There shall be a Council to aid and advise in the Constitution of Privy Council for Canada.  
Government of Canada, to be styled the Queen's Privy

Council for Canada; and the persons who are to be members of that Council shall be from time to time chosen and summoned by the Governor-General and sworn in as Privy Councillors, and members thereof may be from time to time removed by the Governor-General.

All powers under Acts to be exercised by Governor-General with advice of Privy Council, or alone.

12. All powers, authorities, and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, are at the Union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or with any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same continue in existence and capable of being exercised after the Union in relation to the Government of Canada, be vested in and exerciseable by the Governor-General, with the advice, or with the advice and consent of or in conjunction with the Queen's Privy Council for Canada, or any members thereof, or by the Governor-General individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the Parliament of Canada.

Application of provisions referring to Governor-General in Council.

13. The provisions of this Act referring to the Governor-General in Council shall be construed as referring to the Governor-General acting by and with the advice of the Queen's Privy Council for Canada.

Power to Her Majesty to authorize Gover-

14. It shall be lawful for the Queen, if Her Majesty thinks fit, to authorize the Governor-General from time

to time to appoint any person or any persons jointly or severally, to be his Deputy or Deputies within any part or parts of Canada, and in that capacity to exercise, during the pleasure of the Governor-General, such of the powers, authorities and functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen; but the appointment of such a Deputy or Deputies shall not affect the exercise by the Governor-General himself of any power, authority or function.

nor-General  
to appoint  
Deputies.

15. The Command-in-Chief of the Land and Naval Militia, and of all Naval and Military Forces of and in Canada, is hereby declared to continue and be vested in the Queen.

Command of  
armed Forces  
to continue to  
be vested in  
the Queen.

16. Until the Queen otherwise directs, the seat of Government of Canada shall be Ottawa.

Seat of Go-  
vernment of  
Canada.

#### IV.—LEGISLATIVE POWER.

17. There shall be one Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Constitution  
of Parliament  
of Canada.

18. The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate, and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof.

Privileges, &c.  
of Houses.

[This section was repealed by Imperial Act 38 and 39 Vict., cap. 38, *post* p. 55, and the following section substituted therefor :



18. The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities or powers exceeding those at the passing of such Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof.]

First Session  
of the Par-  
liament of  
Canada.

19. The Parliament of Canada shall be called together not later than six months after the Union.

Yearly Session  
of the Par-  
liament of  
Canada.

20. There shall be a Session of the Parliament of Canada once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one Session and its first sitting in the next Session.

#### *The Senate.*

Number of  
Senators.

21. The Senate shall, subject to the provisions of this Act, consist of seventy-two members, who shall be styled Senators.

Representa-  
tion of Pro-  
vinces in  
Senate.

22. In relation to the constitution of the Senate, Canada shall be deemed to consist of Three Divisions—

1. Ontario;

2. Quebec;

3. The Maritime Provinces, Nova Scotia and New Brunswick; which Three Divisions shall (subject to the provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four Senators; Quebec by twenty-four Senators; and the Maritime Provinces by twenty-four Senators, twelve thereof representing Nova Scotia, and twelve thereof representing New Brunswick.

In the case of Quebec each of the twenty-four Senators representing that Province shall be appointed for one of the twenty-four Electoral Divisions of Lower Canada.

specified in Schedule A. to chapter one of the Consolidated Statutes of Canada.

**23.** The qualifications of a Senator shall be as follows :— Qualifications  
of Senator.

- (1.) He shall be of the full age of thirty years :
- (2.) He shall be either a natural-born subject of the Queen, or a subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of one of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union.
- (3.) He shall be legally or equitably seised as of freehold for his own use and benefit of lands or tenements held in free and common socage, or seised or possessed for his own use and benefit of lands or tenements held in franc-alieu or in rotture, within the Province for which he is appointed, and of the value of four thousand dollars, over and above all rents, dues, debts, charges, mortgages, and incumbrances due or payable out of or charged on or affecting the same.
- (4.) His real and personal property shall be together worth four thousand dollars over and above his debts and liabilities.
- (5.) He shall be resident in the Province for which he is appointed.
- (6.) In the case of Quebec, he shall have his real property qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

Summons of  
Senator.

**24.** The Governor-General shall from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon qualified persons to the Senate; and, subject to the provisions of this Act, every person so summoned shall become and be a member of the Senate and a Senator.

Summons of  
First Body of  
Senators.

**25.** Such persons shall be first summoned to the Senate as the Queen, by warrant under Her Majesty's Royal Sign Manual, thinks fit to approve, and their names shall be inserted in the Queen's Proclamation of Union.

Addition of  
Senators in  
certain cases.

**26.** If at any time, on the recommendation of the Governor-General, the Queen thinks fit to direct that three or six members be added to the Senate, the Governor-General may, by summons to three or six qualified persons (as the case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

Reduction of  
Senate to nor-  
mal number.

**27.** In case of such addition being at any time made, the Governor-General shall not summon any person to the Senate, except on a further like direction by the Queen on the like recommendation, until each of the Three Divisions of Canada is represented by twenty-four Senators and no more.

Maximum  
number of  
Senators.

**28.** The number of Senators shall not at any time exceed seventy-eight.

Tenure of  
place in  
Senate.

**29.** A Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

Resignation of  
place in  
Senate.

**30.** A Senator may, by writing under his hand addressed to the Governor-General, resign his place in the Senate, and thereupon the same shall be vacant.

**31.** The place of a Senator shall become vacant in any of the following cases :—

Disqualification  
of  
Senators.

- (1.) If for two consecutive Sessions of the Parliament he fails to give his attendance in the Senate:
- (2.) If he takes an oath or makes a declaration or acknowledgment of allegiance, obedience, or adherence to a foreign power, or does an act whereby he becomes a subject or citizen, or entitled to the rights or privileges of a subject or citizen, of a foreign power:
- (3.) If he is adjudged bankrupt or insolvent, or applies for the benefit of any law relating to insolvent debtors, or becomes a public defaulter:
- (4.) If he is attainted of treason or convicted of felony or of any infamous crime:
- (5.) If he ceases to be qualified in respect of property or of residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of residence by reason only of his residing at the seat of the Government of Canada while holding an office under that Government requiring his presence there.

**32.** When a vacancy happens in the Senate by resignation, death, or otherwise, the Governor-General shall, by summons to a fit and qualified person, fill the vacancy.

Summons on  
vacancy in  
Senate.

**33.** If any question arises respecting the qualification of a Senator or a vacancy in the Senate, the same shall be heard and determined by the Senate.

Questions as to  
qualifications  
and vacancies  
in Senate.

**34.** The Governor-General may from time to time, by instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his stead.

Appointment  
of Speaker of  
Senate.

Quorum of  
Senate.

**35.** Until the Parliament of Canada otherwise provides, the presence of at least fifteen Senators, including the Speaker, shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in  
Senate.

**36.** Questions arising in the Senate shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

*The House of Commons.*

Constitution  
of House of  
Commons in  
Canada.

**37.** The House of Commons shall, subject to the provisions of this Act, consist of one hundred and eighty-one members, of whom eighty-two shall be elected for Ontario, sixty-five for Quebec, nineteen for Nova Scotia, and fifteen for New Brunswick.

Summoning of  
House of  
Commons.

**38.** The Governor-General shall, from time to time, in the Queen's name, by instrument under the Great Seal of Canada, summon and call together the House of Commons.

Senators not  
to sit in House  
of Commons.

**39.** A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

Electoral Dis-  
tricts of the  
four Provinces

**40.** Until the Parliament of Canada otherwise provides, Ontario, Quebec, Nova Scotia, and New Brunswick shall, for the purposes of the election of members to serve in the House of Commons, be divided into Electoral Districts as follows :—

1.—ONTARIO.

Ontario shall be divided into the Counties, Ridings of Counties, Cities, parts of Cities, and Towns enumerated in the first Schedule to this Act, each whereof shall be an Electoral District, each such District as numbered in that Schedule being entitled to return one Member.

## 2.—QUEBEC.

Quebec shall be divided into sixty-five Electoral Districts, composed of the sixty-five Electoral Divisions into which Lower Canada is at the passing of this Act divided under chapter two of the Consolidated Statutes of Canada, chapter seventy-five of the Consolidated Statutes for Lower Canada, and the Act of the Province of Canada of the twenty-third year of the Queen, chapter one, or any other Act amending the same in force at the Union, so that each such Electoral Division shall be for the purposes of this Act an Electoral District entitled to return one member.

## 3.—NOVA SCOTIA.

Each of the eighteen Counties of Nova Scotia shall be an Electoral District. The County of Halifax shall be entitled to return two members, and each of the other Counties one member.

## 4.—NEW BRUNSWICK.

Each of the fourteen Counties into which New Brunswick is divided, including the City and County of St. John, shall be an Electoral District. The City of St. John shall also be a separate Electoral District. Each of those fifteen Electoral Districts shall be entitled to return one member.

41. Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union relative to the following matters or any of them, namely,—the qualifications or disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the several Provinces, the voters at elections of such members, the oaths to be taken by voters, the Returning Officers, their pow-

Continuance  
of existing  
election laws  
until Parlia-  
ment of Can-  
ada otherwise  
provides.

ers and duties, the proceedings at elections, the periods during which elections may be continued, the trial of controverted elections, and proceedings incident thereto, the vacating of seats of members, and the execution of new writs in case of seats vacated otherwise than by dissolution, shall respectively apply to elections of members to serve in the House of Commons for the same several Provinces.

Provided that, until the Parliament of Canada otherwise provides, at any election for a Member of the House of Commons for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject aged twenty-one years or upwards, being a householder, shall have a vote.

**Writs for First Election.**

**42.** For the first election of Members to serve in the House of Commons the Governor-General shall cause writs to be issued by such person, in such form, and addressed to such Returning Officers as he thinks fit.

The person issuing writs under this section shall have the like powers as are possessed at the Union by the officers charged with the issuing of writs for the election of Members to serve in the respective House of Assembly or Legislative Assembly of the Province of Canada, Nova Scotia, or New Brunswick; and the Returning Officers to whom writs are directed under this section shall have the like powers as are possessed at the Union by the officers charged with the returning of writs for the election of Members to serve in the same respective House of Assembly or Legislative Assembly.

**As to Casual Vacancies.**

**43.** In case a vacancy in the representation in the House of Commons of any Electoral District happens before the meeting of the Parliament, or after the meeting of the Parliament before provision is made by the Parliament

in this behalf, the provisions of the last foregoing section of this Act shall extend and apply to the issuing and returning of a writ in respect of such vacant District.

44. The House of Commons, on its first assembling after a general election, shall proceed with all practicable speed to elect one of its members to be Speaker. As to election of Speaker of House of Commons.

45. In case of a vacancy happening in the office of Speaker by death, resignation or otherwise, the House of Commons shall with all practicable speed proceed to elect another of its members to be Speaker. As to filling up vacancy in office of Speaker.

46. The Speaker shall preside at all meetings of the House of Commons. Speaker to preside.

47. Until the Parliament of Canada otherwise provides, in case of the absence for any reason of the Speaker from the chair of the House of Commons for a period of forty-eight consecutive hours, the House may elect another of its members to act as Speaker, and the member so elected shall, during the continuance of such absence of the Speaker, have and execute all the powers, privileges, and duties of Speaker. Provision in case of absence of Speaker.

48. The presence of at least twenty members of the House of Commons shall be necessary to constitute a meeting of the House for the exercise of its powers, and for that purpose the Speaker shall be reckoned as a member. Quorum of House of Commons.

49. Questions arising in the House of Commons shall be decided by a majority of voices other than that of the Speaker, and when the voices are equal, but not otherwise, the Speaker shall have a vote. Voting in House of Commons.

50. Every House of Commons shall continue for five years from the day of the return of the writs for choos- Duration of House of Commons.



ing the House (subject to be sooner dissolved by the Governor-General), and no longer.

Decennial  
Re-adjustment  
of Representa-  
tion.

**51.** On the completion of the census in the year one thousand eight hundred and seventy-one, and of each subsequent decennial census, the representation of the four Provinces shall be re-adjusted by such authority, in such manner and from such time as the Parliament of Canada from time to time provides, subject and according to the following rules :—

- (1.) Quebec shall have the fixed number of sixty-five members :
- (2.) There shall be assigned to each of the other Provinces such a number of members as will bear the same proportion to the number of its population (ascertained at such census) as the number sixty-five bears to the number of the population of Quebec (so ascertained) :
- (3.) In the computation of the number of members for a Province, a fractional part, not exceeding one-half of the whole number requisite for entitling the Province to a member, shall be disregarded ; but a fractional part exceeding one-half of that number shall be equivalent to the whole number :
- (4.) On any such re-adjustment the number of members for a Province shall not be reduced unless the proportion which the number of the population of the Province bore to the number of the aggregate population of Canada at the then last preceding re-adjustment of the number of members for the Province is ascertained at the then latest census, to be diminished by one-twentieth part, or upwards :

- (5.) Such re-adjustment shall not take effect until the termination of the then existing Parliament.

**52.** The number of members of the House of Commons may be from time to time increased by the Parliament of Canada, provided the proportionate representation of the Provinces prescribed by this Act is not thereby disturbed.

Increase of number of House of Commons.

*Money Votes ; Royal Assent.*

**53.** Bills for appropriating any part of the public revenue, or for imposing any tax or impost, shall originate in the House of Commons.

Appropriation and tax bills.

**54.** It shall not be lawful for the House of Commons to adopt or pass any vote, resolution, address, or bill for the appropriation of any part of the public revenue, or of any tax or impost, to any purpose that has not been first recommended to that House by message of the Governor-General in the Session in which such vote, resolution, address, or bill is proposed.

Recommendation of money votes.

**55.** Where a bill passed by the Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the bill for the signification of the Queen's pleasure.

Royal assent to bills, etc.

**56.** Where the Governor-General assents to a bill in the Queen's name, he shall by the first convenient opportunity send an authentic copy of the Act to one of Her Majesty's Principal Secretaries of State; and if the Queen in Council, within two years after receipt

Disallowance by Order in Council of Act assented to by Governor-General.

thereof by the Secretary of State, thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General, by speech or message to each of the Houses of the Parliament, or by proclamation, shall annul the Act from and after the day of such signification.

Signification  
of Queen's  
pleasure on  
bill reserved.

**57.** A bill reserved for the signification of the Queen's pleasure shall not have any force unless and until, within two years from the day on which it was presented to the Governor-General for the Queen's assent, the Governor-General signifies, by speech or message to each of the Houses of the Parliament or by proclamation, that it has received the assent of the Queen in Council.

An entry of every such speech, message, or proclamation, shall be made in the Journal of each House, and a duplicate thereof, duly attested, shall be delivered to the proper officer to be kept among the Records of Canada.

## V.—PROVINCIAL CONSTITUTIONS.

### *Executive Power.*

Appointment  
of Lieutenant-  
Governors of  
Provinces.

**58.** For each Province there shall be an officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada.

Tenure of  
office of  
Lieutenant-  
Governor.

**59.** A Lieutenant-Governor shall hold office during the pleasure of the Governor-General; but any Lieutenant-Governor appointed after the commencement of the first Session of the Parliament of Canada shall not be removeable within five years from his appointment, except for cause assigned, which shall be communicated to him in writing within one month after the order for his removal is made, and shall be communicated by message

to the Senate and to the House of Commons within one week thereafter if the Parliament is then sitting, and if not then within one week after the commencement of the next Session of the Parliament.

**60.** The salaries of the Lieutenant-Governors shall be fixed and provided by the Parliament of Canada.

Salaries of  
Lieutenant-  
Governors.

**61.** Every Lieutenant-Governor shall, before assuming the duties of his office, make and subscribe before the Governor-General or some person authorized by him, oaths of allegiance and office similar to those taken by the Governor-General.

Oaths, &c., of  
Lieutenant-  
Governor.

**62.** The provisions of this Act referring to the Lieutenant-Governor extend and apply to the Lieutenant-Governor for the time being of each Province or other the chief executive officer or administrator for the time being carrying on the government of the Province, by whatever title he is designated.

Application of  
provisions  
referring to  
Lieutenant-  
Governor.

**63.** The Executive Council of Ontario and of Quebec shall be composed of such persons as the Lieutenant-Governor from time to time thinks fit, and in the first instance of the following officers, namely:—the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works; with in Quebec the Speaker of the Legislative Council and the Solicitor-General.

Appointment  
of executive  
officers for  
Ontario and  
Quebec.

**64.** The Constitution of the Executive Authority in each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union, until altered under the authority of this Act.

Executive Go-  
vernment of  
Nova Scotia  
and New  
Brunswick.

Powers to be exercised by Lieutenant-Governor of Ontario or Quebec with advice or alone.

**65.** All powers, authorities and functions which under any Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of Upper Canada, Lower Canada, or Canada, were or are before or at the Union vested in or exerciseable by the respective Governors or Lieutenant-Governors of those Provinces, with the advice, or with the advice and consent, of the respective Executive Councils thereof, or in conjunction with those Councils, or of any number of members thereof, or by those Governors or Lieutenant-Governors individually, shall, as far as the same are capable of being exercised after the Union in relation to the Government of Ontario and Quebec respectively, be vested in and shall or may be exercised by the Lieutenant-Governor of Ontario and Quebec respectively, with the advice or with the advice and consent of or in conjunction with the respective Executive Councils, or any members thereof, or by the Lieutenant-Governor individually, as the case requires, subject nevertheless (except with respect to such as exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland) to be abolished or altered by the respective Legislatures of Ontario and Quebec.

Application of provisions referring to Lieutenant-Governor in Council.

**66.** The provisions of this Act referring to the Lieutenant-Governor in Council shall be construed as referring to the Lieutenant-Governor of the Province acting by and with the advice of the Executive Council thereof.

Administration in absence etc., of Lieutenant-Governor.

**67.** The Governor-General in Council may from time to time appoint an administrator to execute the office and functions of Lieutenant-Governor during his absence, illness or other inability.

68. Unless and until the Executive Government of any Province otherwise directs with respect to that Province, the seats of Government of the Provinces shall be as follows: namely,—of Ontario, the City of Toronto; of Quebec, the City of Quebec; of Nova Scotia, the City of Halifax; and of New Brunswick, the City of Fredericton.

*Legislative Power.*

1.—ONTARIO.

69. There shall be a Legislature for Ontario consisting of the Lieutenant-Governor and of one House, styled the Legislative Assembly of Ontario.

70. The Legislative Assembly of Ontario shall be composed of eighty-two members, to be elected to represent the eighty-two Electoral Districts set forth in the first Schedule to this Act.

2.—QUEBEC.

71. There shall be a Legislature for Quebec, consisting of the Lieutenant-Governor and of two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

72. The Legislative Council of Quebec shall be composed of twenty-four members, to be appointed by the Lieutenant-Governor, in the Queen's name, by instrument under the Great Seal of Quebec, one being appointed to represent each of the twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding office for the term of his life, unless the Legislature of Quebec otherwise provides under the provisions of this Act.

**Qualification  
of Legislative  
Councillors.**

**73.** The qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.

**Resignation,  
disqualifica-  
tion, &c.**

**74.** The place of a Legislative Councillor of Quebec shall become vacant in the cases, *mutatis mutandis*, in which the place of Senator becomes vacant.

**Vacancies.**

**75.** When a vacancy happens in the Legislative Council of Quebec, by resignation, death, or otherwise, the Lieutenant-Governor, in the Queen's name, by instrument under the Great Seal of Quebec, shall appoint a fit and qualified person to fill the vacancy.

**Questions as  
to vacancies,  
&c.**

**76.** If any question arises respecting the qualification of a Legislative Councillor of Quebec, or a vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council.

**Speaker of  
Legislative  
Council.**

**77.** The Lieutenant-Governor may from time to time, by instrument under the Great Seal of Quebec, appoint a member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another in his stead.

**Quorum of  
Legislative  
Council.**

**78.** Until the Legislature of Quebec otherwise provides, the presence of at least ten members of the Legislative Council, including the Speaker, shall be necessary to constitute a meeting for the exercise of its powers.

**Voting in  
Legislative  
Council.**

**79.** Questions arising in the Legislative Council of Quebec shall be decided by a majority of voices, and the Speaker shall in all cases have a vote, and when the voices are equal the decision shall be deemed to be in the negative.

**Constitution  
of Legislative  
Assembly of  
Quebec.**

**80.** The Legislative Assembly of Quebec shall be composed of sixty-five members, to be elected to represent

the sixty-five Electoral Divisions or Districts of Lower Canada in this Act referred to, subject to alteration thereof by the Legislature of Quebec: Provided that it shall not be lawful to present to the Lieutenant-Governor of Quebec for assent any bill for altering the limits of any of the Electoral Divisions or Districts mentioned in the second Schedule to this Act, unless the second and third readings of such bill have been passed in the Legislative Assembly with the concurrence of the majority of the members representing all those Electoral Divisions or Districts, and the assent shall not be given to such bill unless an address has been presented by the Legislative Assembly to the Lieutenant-Governor stating that it has been so passed.

### 3.—ONTARIO AND QUEBEC.

**81.** The Legislatures of Ontario and Quebec respectively shall be called together not later than six months after the Union. First Session of Legislatures.

**82.** The Lieutenant-Governor of Ontario and of Quebec shall from time to time, in the Queen's name, by instrument under the Great Seal of the Province, summon and call together the Legislative Assembly of the Province. Summoning of Legislative Assemblies.

**83.** Until the Legislature of Ontario or of Quebec otherwise provides, a person accepting or holding in Ontario or in Quebec any office, commission, or employment, permanent or temporary, at the nomination of the Lieutenant-Governor, to which an annual salary, or any fee, allowance, emolument, or profit of any kind or amount whatever from the Province is attached, shall not be eligible as a member of the Legislative Assembly of the respective Province, nor shall he sit or vote as Restriction on election of holders of offices.



such ; but nothing in this section shall make ineligible any person being a member of the Executive Council of the respective Province, or holding any of the following offices, that is to say, the offices of Attorney-General, Secretary and Registrar of the Province, Treasurer of the Province, Commissioner of Crown Lands, and Commissioner of Agriculture and Public Works, and in Quebec Solicitor-General, or shall disqualify him to sit or vote in the House for which he is elected, provided he is elected while holding such office.

Continuance  
of existing  
election laws.

84. Until the Legislatures of Ontario and Quebec respectively otherwise provide, all laws which at the Union are in force in those Provinces respectively, relative to the following matters, or any of them, namely,—the qualifications and disqualifications of persons to be elected or to sit or vote as members of the Assembly of Canada, the qualifications or disqualifications of voters, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which such elections may be continued, and the trial of controverted elections and the proceedings incident thereto, the vacating of the seats of members and the issuing and execution of new writs in case of seats vacated otherwise than by dissolution, shall respectively apply to elections of members to serve in the respective Legislative Assemblies of Ontario and Quebec.

Provided that until the Legislature of Ontario otherwise provides, at any election for a member of the Legislative Assembly of Ontario for the District of Algoma, in addition to persons qualified by the law of the Province of Canada to vote, every male British subject, aged twenty-one years or upwards, being a householder, shall have a vote.

**85.** Every Legislative Assembly of Ontario and every Legislative Assembly of Quebec shall continue for four years from the day of the return of the writs for choosing the same (subject nevertheless to either the Legislative Assembly of Ontario or the Legislative Assembly of Quebec being sooner dissolved by the Lieutenant-Governor of the Province), and no longer. Duration of Legislative Assemblies.

**86.** There shall be a Session of the Legislature of Ontario and of that of Quebec once at least in every year, so that twelve months shall not intervene between the last sitting of the Legislature in each Province in one Session and its first sitting in the next Session. Yearly Session of Legislature.

**87.** The following provisions of this Act respecting the House of Commons of Canada shall extend and apply to the Legislative Assemblies of Ontario and Quebec, that is to say,—the provisions relating to the election of a Speaker originally and on vacancies, the duties of the Speaker, the absence of the Speaker, the quorum, and the mode of voting, as if those provisions were here re-enacted and made applicable in terms to each such Legislative Assembly. Speaker, quorum, &c.

#### 4.—NOVA SCOTIA AND NEW BRUNSWICK.

**88.** The constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act; and the House of Assembly of New Brunswick, existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected. Constitutions of Legislatures of Nova Scotia and New Brunswick.

#### 5.—ONTARIO, QUEBEC, AND NOVA SCOTIA.

**89.** Each of the Lieutenant-Governors of Ontario, Quebec and Nova Scotia shall cause writs to be issued for the first election of members of the Legislative Assembly. First elections.

thereof in such form and by such person as he thinks fit, and at such time and addressed to such Returning Officer as the Governor-General directs, and so that the first election of member of Assembly for any Electoral District or any subdivision thereof shall be held at the same time and at the same places as the election for a member to serve in the House of Commons of Canada for that Electoral District.

#### 6.—THE FOUR PROVINCES.

Application to  
Legislatures  
of provisions  
respecting  
money votes,  
&c.

**90.** The following provisions of this Act respecting the Parliament of Canada, namely,—the provisions relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of Acts, and the signification of pleasure on bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those provisions were here re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of one year for two years, and of the Province for Canada.

#### VI.—DISTRIBUTION OF LEGISLATIVE POWERS.

##### *Powers of the Parliament.*

Legislative  
authority of  
Parliament of  
Canada.

**91.** It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared

that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say :—

1. The Public Debt and Property.
2. The regulation of Trade and Commerce.
3. The raising of money by any mode or system of Taxation.
4. The borrowing of money on the public credit.
5. Postal service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the establishment and maintenance of Marine Hospitals.
12. Sea coast and inland Fisheries.
13. Ferries between a Province and any British or Foreign country or between two Provinces.
14. Currency and Coinage.
15. Banking, incorporation of banks, and the issue of paper money.
16. Savings' Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal tender.
21. Bankruptcy and Insolvency.
22. Patents of invention and discovery.
23. Copyrights.
24. Indians, and lands reserved for the Indians
25. Naturalization and Aliens.

26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

*Exclusive Powers of Provincial Legislatures.*

Subjects of  
exclusive  
Provincial  
Legislation.

**92.** In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial purposes.
3. The borrowing of money on the sole credit of the Province.
4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the timber and wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences, in order to the raising of a Revenue for Provincial, local, or municipal purposes.
10. Local Works and Undertakings other than such as are of the following classes,—
  - a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province :
  - b. Lines of Steam Ships between the Province and any British or Foreign Country :
  - c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.
11. The incorporation of Companies with Provincial objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.
16. Generally all matters of a merely local or private nature in the Province.

*Education.*

Legislation  
respecting  
education.

**93.** In and for each Province the Legislature may exclusively make laws in relation to Education, subject and according to the following provisions :

- (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.
- (2) All the powers, privileges, and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be, and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec :
- (3) Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education :
- (4) In case any such Provincial law as from time to time seems to the Governor-General in Council

requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section.

*Uniformity of Laws in Ontario, Nova Scotia and New Brunswick.*

94. Notwithstanding anything in this Act, the Parliament of Canada may make provision for the uniformity of all or any of the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and of the procedure of all or any of the Courts in those three Provinces; and from and after the passing of any Act in that behalf the power of the Parliament of Canada to make laws in relation to any matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making provision for such uniformity shall not have effect in any Province unless and until it is adopted and enacted as law by the Legislature thereof.

Legislation for uniformity of Laws in three Provinces.

*Agriculture and Immigration.*

95. In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from time to time make

Concurrent powers of Legislation respecting Agriculture, etc.



laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces ; and any law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

## VII.—JUDICATURE.

Appointment  
of Judges.

**96.** The Governor-General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Selection of  
Judges in  
Ontario, etc.

**97.** Until the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, and the procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor-General shall be selected from the respective Bars of those Provinces.

Selection of  
Judges in  
Quebec.

**98.** The Judges of the Courts of Quebec shall be selected from the Bar of that Province.

Tenure of  
office of Judges  
of Superior  
Courts.

**99.** The Judges of the Superior Courts shall hold office during good behaviour, but shall be removeable by the Governor-General on address of the Senate and House of Commons.

Salaries, etc.,  
of Judges.

**100.** The salaries, allowances, and pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in cases where the Judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

General Court  
of Appeal, etc.

**101.** The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for

the constitution, maintenance, and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the Laws of Canada.

#### VIII.—REVENUES ; DEBTS ; ASSETS ; TAXATION.

**102.** All duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick, before and at the Union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special powers conferred on them by this Act, shall form one Consolidated Revenue Fund, to be appropriated for the public service of Canada in the manner and subject to the charges in this Act provided.

Creation of  
Consolidated  
Revenue  
Fund.

**103.** The Consolidated Revenue Fund of Canada shall be permanently charged with the costs, charges, and expenses incident to the collection, management, and receipt thereof, and the same shall form the first charge thereon, subject to be reviewed and audited in such manner as shall be ordered by the Governor-General in Council until the Parliament otherwise provides.

Expenses of  
collection, etc.

**104.** The annual interest of the public debts of the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union shall form the second charge on the Consolidated Revenue Fund of Canada.

Interest of  
Provincial  
public debts.

**105.** Unless altered by the Parliament of Canada, the salary of the Governor-General shall be ten thousand pounds sterling money of the United Kingdom of Great Britain and Ireland, payable out of the Consolidated Revenue Fund of Canada, and the same shall form the third charge thereon.

Salary of  
Governor-  
General.

Appropriation  
from time to  
time.

**106.** Subject to the several payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the public service.

Transfer of  
stocks, etc.

**107.** All stocks, cash, bankers' balances, and securities for money belonging to each Province at the time of the Union, except as in this Act mentioned, shall be the property of Canada, and shall be taken in reduction of the amount of the respective debts of the Provinces at the Union.

Transfer of  
property in  
schedule.

**108.** The public works and property of each Province, enumerated in the third Schedule to this Act, shall be the property of Canada.

Property in  
lands, mines,  
etc.

**109.** All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

Assets con-  
nected with  
Provincial  
debts.

**110.** All assets connected with such portions of the public debt of each Province as are assumed by that Province shall belong to that Province.

Canada to be  
liable for  
Provincial  
debts.

**111.** Canada shall be liable for the debts and liabilities of each Province existing at the Union.

Debts of  
Ontario and  
Quebec.

**112.** Ontario and Quebec conjointly shall be liable to Canada for the amount (if any) by which the debt of the Province of Canada exceeds at the Union sixty-two million five hundred thousand dollars, and shall be charged with interest at the rate of five per centum per annum thereon.

**113.** The assets enumerated in the fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the property of Ontario and Quebec conjointly. Assets of Ontario and Quebec.

**114.** Nova Scotia shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union eight million dollars, and shall be charged with interest at the rate of five per centum per annum thereon. Debt of Nova Scotia.

**115.** New Brunswick shall be liable to Canada for the amount (if any) by which its public debt exceeds at the Union seven million dollars, and shall be charged with interest at the rate of five per centum per annum thereon. Debt of New Brunswick.

**116.** In case the public debts of Nova Scotia and New Brunswick do not at the Union amount to eight million and seven million dollars respectively, they shall respectively receive, by half-yearly payments in advance, from the Government of Canada interest at five per centum per annum on the difference between the actual amounts of their respective debts and such stipulated amounts. Payment of interest to Nova Scotia and New Brunswick.

**117.** The several Provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. Provincial public property.

**118.** The following sums shall be paid yearly by Canada to the several Provinces for the support of their Governments and Legislatures :— Grants to Provinces.

	Dollars.
Ontario - - - -	- Eighty thousand.
Quebec - - - -	- Seventy thousand.
Nova Scotia - - -	- Sixty thousand.
New Brunswick - -	- Fifty thousand.

Two hundred and sixty thousand ;

and an annual grant in aid of each Province shall be made, equal to eighty cents per head of the population as ascertained by the Census of one thousand eight hundred and sixty-one, and in the case of Nova Scotia and New Brunswick, by each subsequent decennial Census until the population of each of those two Provinces amounts to four hundred thousand souls, at which rate such grant shall thereafter remain. Such grants shall be in full settlement of all future demands on Canada, and shall be paid half-yearly in advance to each Province; but the Government of Canada shall deduct from such grants, as against any Province, all sums chargeable as interest on the Public Debt of that Province in excess of the several amounts stipulated in this Act.

Further grant  
to New  
Brunswick.

119. New Brunswick shall receive by half-yearly payments in advance from Canada for the period of ten years from the Union an additional allowance of sixty-three thousand dollars per annum; but as long as the Public Debt of that Province remains under seven million dollars, a reduction equal to the interest at five per centum per annum on such deficiency shall be made from that allowance of sixty-three thousand dollars.

Form of  
payments.

120. All payments to be made under this Act, or in discharge of liabilities created under any Act of the Provinces of Canada, Nova Scotia and New Brunswick respectively, and assumed by Canada, shall, until the Parliament of Canada otherwise directs, be made in such form and manner as may from time to time be ordered by the Governor-General in Council.

Canadian  
manufac-  
tures, etc.

121. All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

**122.** The Customs and Excise Laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada.

Continuance  
of Customs  
and Excise  
laws.

**123.** Where Customs duties are, at the Union, leviable on any goods, wares, or merchandises in any two Provinces, those goods, wares, and merchandises may, from and after the Union, be imported from one of those Provinces into the other of them on proof of payment of the Customs duty leviable thereon in the Province of exportation, and on payment of such further amount (if any) of Customs duty as is leviable thereon in the Province of importation.

Exportation  
and importa-  
tion as  
between two  
Provinces.

**124.** Nothing in this Act shall affect the right of New Brunswick to levy the lumber dues provided in chapter fifteen of title three of the Revised Statutes of New Brunswick, or in any Act amending that Act before or after the Union, and not increasing the amount of such dues; but the lumber of any of the Provinces other than New Brunswick shall not be subjected to such dues.

Lumber dues  
in New  
Brunswick.

**125.** No lands or property belonging to Canada or any Province shall be liable to taxation.

Exemption of  
public lands,  
etc.

**126.** Such portions of the duties and revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick had before the Union power of appropriation as are by this Act reserved to the respective Governments or Legislatures of the Provinces, and all duties and revenues raised by them in accordance with the special powers conferred upon them by this Act, shall in each Province form one Consolidated Revenue Fund to be appropriated for the public service of the Province.

Provincial  
Consolidated  
Revenue  
Fund.

## IX.—MISCELLANEOUS PROVISIONS.

### *General.*

**127.** If any person being at the passing of this Act a Member of the Legislative Council of Canada, Nova

As to Legisla-  
tive Council-  
lors of Prov.

inces becoming Senators.

Scotia, or New Brunswick, to whom a place in the Senate is offered, does not within thirty days thereafter, by writing under his hand addressed to the Governor-General of the Province of Canada or to the Lieutenant-Governor of Nova Scotia or New Brunswick (as the case may be), accept the same, he shall be deemed to have declined the same; and any person who, being at the passing of this Act a member of the Legislative Council of Nova Scotia, or New Brunswick, accepts a place in the Senate shall thereby vacate his seat in such Legislative Council.

Oath of allegiance, etc.

**128.** Every member of the Senate or House of Commons of Canada shall, before taking his seat therein, take and subscribe before the Governor-General or some person authorized by him, and every member of a Legislative Council or Legislative Assembly of any Province shall, before taking his seat therein, take and subscribe before the Lieutenant-Governor of the Province, or some person authorized by him, the oath of allegiance contained in the fifth Schedule to this Act; and every member of the Senate of Canada and every member of the Legislative Council of Quebec shall also, before taking his seat therein, take and subscribe before the Governor-General, or some person authorized by him, the declaration of qualification contained in the same Schedule.

Continuance of existing Laws, Courts, Officers, etc.

**129.** Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia, or New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made: subject nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain, or of the

Parliament of the United Kingdom of Great Britain and Ireland,) to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act.

**130.** Until the Parliament of Canada otherwise provides, all officers of the several Provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities, and penalties as if the Union had not been made. Transfer of officers to Canada.

**131.** Until the Parliament of Canada otherwise provides, the Governor-General in Council may, from time to time, appoint such officers as the Governor-General in Council deems necessary or proper for the effectual execution of this Act. Appointment of new officers.

**132.** The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any Province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries. Treaty obligations.

**133.** Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. Use of English and French languages.



The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those languages.

*Ontario and Quebec.*

Appointment  
of executive  
officers for  
Ontario and  
Quebec.

134. Until the Legislature of Ontario or of Quebec otherwise provides, the Lieutenant-Governors of Ontario and Quebec may each appoint under the Great Seal of the Province the following officers, to hold office during pleasure, that is to say—the Attorney-General, the Secretary and Registrar of the Province, the Treasurer of the Province, the Commissioner of Crown Lands, and the Commissioner of Agriculture and Public Works, and in the case of Quebec the Solicitor-General; and may, by order of the Lieutenant-Governor in Council, from time to time prescribe the duties of those officers and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof; and may also appoint other and additional officers to hold office during pleasure, and may from time to time prescribe the duties of those officers and of the several departments over which they shall preside or to which they shall belong, and of the officers and clerks thereof.

Powers, duties  
etc., of  
executive  
officers.

135. Until the Legislature of Ontario or Quebec otherwise provides, all rights, powers, duties, functions, responsibilities, or authorities at the passing of this Act vested in or imposed on the Attorney-General, Solicitor-General, Secretary and Registrar of the Province of Canada, Minister of Finance, Commissioner of Crown Lands, Commissioner of Public Works, and Minister of Agriculture and Receiver-General, by any law, statute or ordinance of Upper Canada, Lower Canada, or Canada, and not repugnant to this Act, shall be vested in or imposed on any officer to be appointed by the Lieutenant-

Governor for the discharge of the same or any of them; and the Commissioner of Agriculture and Public Works shall perform the duties and functions of the office of Minister of Agriculture at the passing of this Act imposed by the law of the Province of Canada, as well as those of the Commissioner of Public Works.

**136.** Until altered by the Lieutenant-Governor in Great Seals. Council, the Great Seals of Ontario and Quebec respectively shall be the same, or of the same design, as those used in the Provinces of Upper Canada and Lower Canada respectively before their Union as the Province of Canada.

**137.** The words "and from thence to the end of the then next ensuing Session of the Legislature," or words to the same effect, used in any temporary Act of the Province of Canada not expired before the Union, shall be construed to extend and apply to the next Session of the Parliament of Canada, if the subject matter of the Act is within the powers of the same, as defined by this Act, or to the next Sessions of the Legislatures of Ontario and Quebec respectively, if the subject matter of the Act is within the powers of the same as defined by this Act. Construction of temporary Acts.

**138.** From and after the Union, the use of the words "Upper Canada" instead of "Ontario," or "Lower Canada" instead of "Quebec," in any deed, writ, process, pleading, document, matter or thing, shall not invalidate the same. As to errors in names.

**139.** Any Proclamation under the Great Seal of the Province of Canada issued before the Union to take effect at a time which is subsequent to the Union, whether relating to that Province, or to Upper Canada, or to Lower Canada, and the several matters and things therein pro- As to issue of Proclamations before Union, to commence after Union.

claimed shall be and continue of like force and effect as if the Union had not been made.

As to issue of  
Proclamations  
after Union.

**140.** Any Proclamation which is authorized by any Act of the Legislature of the Province of Canada to be issued under the Great Seal of the Province of Canada, whether relating to that Province, or to Upper Canada, or to Lower Canada, and which is not issued before the Union, may be issued by the Lieutenant-Governor of Ontario or of Quebec, as its subject matter requires, under the Great Seal thereof; and from and after the issue of such Proclamation the same and the several matters and things therein proclaimed shall be and continue of the like force and effect in Ontario or Quebec as if the Union had not been made.

Penitentiary.

**141.** The Penitentiary of the Province of Canada shall, until the Parliament of Canada otherwise provides, be and continue the Penitentiary of Ontario and of Quebec.

Arbitration  
respecting  
debts, etc.

**142.** The division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada shall be referred to the arbitrament of three arbitrators, one chosen by the Government of Ontario, one by the Government of Quebec, and one by the Government of Canada; and the selection of the arbitrators shall not be made until the Parliament of Canada and the Legislatures of Ontario and Quebec have met; and the arbitrator chosen by the Government of Canada shall not be a resident either in Ontario or in Quebec.

Division of  
records.

**143.** The Governor-General in Council may from time to time order that such and so many of the records, books, and documents of the Province of Canada as he thinks fit shall be appropriated and delivered either to

Ontario or to Quebec, and the same shall thenceforth be the property of that Province; and any copy thereof or extract therefrom, duly certified by the officer having charge of the original thereof shall be admitted as evidence.

144. The Lieutenant-Governor of Quebec may from time to time, by Proclamation under the Great Seal of the Province, to take effect from a day to be appointed therein, constitute townships in those parts of the Province of Quebec in which townships are not then already constituted, and fix the metes and bounds thereof.

Constitution of townships in Quebec.

#### X.—INTERCOLONIAL RAILWAY.

145. Inasmuch as the Provinces of Canada, Nova Scotia, and New Brunswick have joined in a declaration that the construction of the Intercolonial Railway is essential to the consolidation of the Union of British North America, and to the assent thereto of Nova Scotia and New Brunswick, and have consequently agreed that provision should be made for its immediate construction by the Government of Canada: Therefore, in order to give effect to that agreement, it shall be the duty of the Government and Parliament of Canada to provide for the commencement within six months after the Union, of a railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the construction thereof without intermission, and the completion thereof with all practicable speed.

Duty of Government and Parliament of Canada to make railway herein described.

#### XI.—ADMISSION OF OTHER COLONIES.

146. It shall be lawful for the Queen, by and with the advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legisla-

Power to admit Newfoundland, etc., into the Union.

tures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such terms and conditions in each case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council in that behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.

As to representation of Newfoundland and Prince Edward Island in Senate.

147. In case of the admission of Newfoundland and Prince Edward Island, or either of them, each shall be entitled to a representation in the Senate of Canada of four members, and (notwithstanding anything in this Act) in case of the admission of Newfoundland the normal number of Senators shall be seventy-six, and their maximum number shall be eighty-two; but Prince Edward Island, when admitted, shall be deemed to be comprised in the third of the three divisions into which Canada is, in relation to the constitution of the Senate, divided by this Act, and accordingly, after the admission of Prince Edward Island, whether Newfoundland is admitted or not, the representation of Nova Scotia and New Brunswick in the Senate shall, as vacancies occur, be reduced from twelve to ten members respectively, and the representation of each of those Provinces shall not be increased at any time beyond ten, except under the provisions of this Act for the appointment of three or six additional Senators under the direction of the Queen.

## SCHEDULES.

## THE FIRST SCHEDULE.

*Electoral Districts of Ontario.*

## A.

## EXISTING ELECTORAL DIVISIONS.

## COUNTIES.

- |               |                   |
|---------------|-------------------|
| 1. Prescott.  | 6. Carleton.      |
| 2. Glengarry. | 7. Prince Edward. |
| 3. Stormont.  | 8. Halton.        |
| 4. Dundas.    | 9. Essex.         |
| 5. Russell.   |                   |

## RIDINGS OF COUNTIES.

10. North Riding of Lanark.
11. South Riding of Lanark.
12. North Riding of Leeds and North Riding of Grenville.
13. South Riding of Leeds.
14. South Riding of Grenville.
15. East Riding of Northumberland.
16. West Riding of Northumberland (excepting therefrom the Township of South Monaghan).
17. East Riding of Durham.
18. West Riding of Durham.
19. North Riding of Ontario.
20. South Riding of Ontario.
21. East Riding of York.
22. West Riding of York.
23. North Riding of York.

24. North Riding of Wentworth.
25. South Riding of Wentworth.
26. East Riding of Elgin.
27. West Riding of Elgin.
28. North Riding of Waterloo.
29. South Riding of Waterloo.
30. North Riding of Brant.
31. South Riding of Brant.
32. North Riding of Oxford.
33. South Riding of Oxford.
34. East Riding of Middlesex.

CITIES, PARTS OF CITIES, AND TOWNS.

35. West Toronto.
36. East Toronto.
37. Hamilton.
38. Ottawa.
39. Kingston.
40. London.
41. Town of Brockville, with the Township of Elizabethtown thereto attached.
42. Town of Niagara, with the Township of Niagara thereto attached.
43. Town of Cornwall, with the Township of Cornwall thereto attached.

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B.

NEW ELECTORAL DIVISIONS.

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44. The Provincial Judicial District of ALGOMA.

The County of BRUCE, divided into two Ridings, to be called respectively the North and South Ridings:—

45. The North Riding of Bruce to consist of the Townships of Bury, Lindsay, Eastnor, Albemarle, Amable, Arran, Bruce, Elderslie, and Saugeen, and the Village of Southampton.
46. The South Riding of Bruce to consist of the Townships of Kincardine (including the Village of Kincardine), Greenock, Brant, Huron, Kinloss, Culross, and Carrick.

The County of HURON, divided into two Ridings, to be called respectively the North and South Ridings :—

47. The North Riding to consist of the Townships of Ashfield, Wawanosh, Turnberry, Howick, Morris, Grey, Colborne. Hullett, including the Village of Clinton, and McKillop.
48. The South Riding to consist of the Town of Goderich and the Township of Goderich, Tuckeramith, Stanley, Hay, Usborne, and Stephen.

The County of MIDDLESEX, divided into three Ridings, to be called respectively the North, West, and East Ridings :—

49. The North Riding to consist of the Townships of McGillivray and Biddulph (taken from the County of Huron), and Williams East, Williams West, Adelaide, and Lobo.
50. The West Riding to consist of the Townships of Delaware, Carradoc, Metcalfe, Moss, and Ekfrid, and the Village of Strathroy.

[The East Riding to consist of the Townships now embraced therein, and be bounded as it is at present.]

51. The County of LAMBTON to consist of the Townships of Bosanquet, Warwick, Plympton, Sarnia, Moore, Ennis-killen, and Brooke, and the Town of Sarnia.
52. The County of KENT to consist of the Townships of Chatham, Dover, East Tilbury, Romney, Raleigh, and Harwich, and the Town of Chatham.
53. The County of BOTHWELL to consist of the Townships of Sombra, Dawn, and Eupheusia (taken from the County of Lambton), and the Townships of Zone, Camden, with the Gore thereof, Orford, and Howard (taken from the County of Kent).

The County of GREY divided into two Ridings, to be called respectively the South and North Ridings :—

54. The South Riding to consist of the Townships of Bentinck, Glenelg, Artemesia, Osprey, Normanby, Egremont, Proton, and Melancthon.
55. The North Riding to consist of the Townships of Collingwood, Euphrasia, Holland, Saint Vincent, Sydenham, Sullivan, Derby, and Keppel, Sarawak and Brooke, and the Town of Owen Sound.



The County of PERTH divided into two Ridings, to be called respectively the South and North Ridings :—

56. The North Riding to consist of the Townships of Wallace, Elma, Logan, Ellice, Mornington, and North Easthope, and the Town of Stratford.
57. The South Riding to consist of the Townships of Blanchard, Downie, South Easthope, Fullarton, Hibbert, and the Villages of Mitchell and St. Mary's.

The County of WELLINGTON divided into three Ridings, to be called respectively North, South and Centre Ridings :—

58. The North Riding to consist of the Townships of Amaranth, Arthur, Luther, Minto, Maryborough, Peel, and the Village of Mount Forest.
59. The Centre Riding to consist of the Townships of Garafraxa, Erin, Eramosa, Nichol and Pilkington, and the Villages of Fergus and Elora.
60. The South Riding to consist of the Town of Guelph, and the Townships of Guelph and Puslinch.

The County of NORFOLK divided into two Ridings, to be called respectively the South and North Ridings :—

61. The South Riding to consist of the Townships of Charlotteville, Houghton, Walsingham, and Woodhouse, and with the Gore thereof.
62. The North Riding to consist of the Townships of Middleton, Townsend, and Windham, and the Town of Simcoe.
63. The County of HALDIMAND to consist of the Townships of Oneida, Seneca, Cayuga North, Cayuga South, Rainham, Walpole, and Dunn.
64. The County of MONCK to consist of the Townships of Canborough and Moulton and Sherbrooke, and the Village of Dunnville (taken from the County of Haldimand), the Townships of Caistor and Gainsborough (taken from the County of Lincoln), and the Townships of Pelham and Wainfleet (taken from the County of Welland).
65. The County of LINCOLN to consist of the Townships of Clinton, Grantham, Grimsby, and Louth, and the Town of St. Catharines.

66. The County of WELLAND to consist of the Townships of Bertie, Crowland, Humberstone, Stamford, Thorold, and Willoughby, and the Villages of Chippewa, Clifton, Fort Erie, Thorold, and Welland.
67. The County of PEEL to consist of the Townships of Chinguacousy, Toronto, and the Gore of Toronto, and the Villages of Brampton and Streetsville.
68. The County of CARDWELL to consist of the Townships of Albion and Caledon (taken from the County of Peel), and the Townships of Adjala and Mono (taken from the County of Simcoe).

The County of SIMCOE divided into two Ridings, to be called respectively the South and North Ridings :—

- 69 The South Riding to consist of the Townships of West Gwillimbury, Tecumseth, Innisfil, Essa, Tossorontio, Mulmur, and the village of Bradford.
70. The North Riding to consist of the Townships of Nottawasaga, Sunnidale, Vespra, Flos, Oro, Medonte, Orillia and Matchedash, Tiny and Tay, Balaklava and Robinson, and the Towns of Barrie and Collingwood.

The County of VICTORIA divided into two Ridings, to be called respectively the South and North Ridings :—

71. The South Riding to consist of the Townships of Ops, Mariposa, Emily, Verulam, and the Town of Lindsay.
72. The North Riding to consist of the Townships of Anson, Bexley, Carden, Dalton, Digby, Eldon, Fenelon, Hindon, Laxton, Lutterworth, Macaulay and Draper, Somerville and Morrison, Muskoka, Monck and Watt (taken from the County of Simcoe), and any other surveyed Townships lying to the north of the said North Riding.

The County of PETERBOROUGH divided into two Ridings, to be called respectively the West and East Ridings :—

73. The West Riding to consist of the Townships of South Monaghan (taken from the County of Northumberland), North Monaghan, Smith and Ennismore, and the Town of Peterborough.

74. The East Riding to consist of the Townships of Asphodel, Belmont and Methuen, Douro, Dummer, Galway, Harvey, Minden, Stanhope and Dysart, Otonabee and Snowden, and the Village of Ashburnham, and any other surveyed Townships lying to the north of the said East Riding.

The County of HASTINGS divided into three Ridings, to be called respectively the West, East, and North Ridings :—

75. The West Riding to consist of the Town of Belleville, the Township of Sydney, and the village of Trenton.
76. The East Riding to consist of the Townships of Thurlow, Tyendinaga, and Hungerford.
77. The North Riding to consist of the Townships of Rawdon, Huntingdon, Madoc, Elzevir, Tudor, Marmora, and Lake, and the Village of Stirling, and any other surveyed Townships lying to the North of the said North Riding.
78. The County of LENNOX to consist of the Townships of Richmond, Adolphustown, North Fredericksburgh, South Fredericksburgh, Ernest Town, and Amherst Island, and the Village of Napanee.
79. The County of ADDINGTON to consist of the Townships of Camden, Portland, Sheffield, Hinchinbrooke, Kaladar, Kennebec, Olden, Oso, Anglesea, Barrie, Clarendon, Palmerston, Effingham, Abinger, Miller, Canonto, Denbigh, Loughborough, and Bedford.
80. The County of FRONTENAC to consist of the Townships of Kingston, Wolfe Island, Pittsburgh and Howe Island, and Storrington.

The County of RENFREW divided into two Ridings, to be called respectively the South and North Ridings :—

81. The South Riding to consist of the Townships of McNab, Bagot, Blithfield, Brougham, Horton, Admaston, Grattan, Matawatchan, Griffith, Lyndoch, Raglan, Radcliffe, Brudenell, Sebastopol, and the Villages of Arnprior and Renfrew.
82. The North Riding to consist of the Townships of Ross, Bromley, Westmeath, Stafford, Pembroke, Wilberforce, Alice, Petawawa, Buchanan, South Algona, North Algona,

Fraser, McKay, Wylie, Rolph, Head, Maria, Clara, Hagarty, Sherwood, Burns, and Richards, and any other surveyed Townships lying north-westerly of the said North Riding.

Every Town and incorporated Village existing at the Union, not specially mentioned in this Schedule, is to be taken as part of the County or Riding within which it is locally situate.

## THE SECOND SCHEDULE.

*Electoral Districts of Quebec specially fixed.*

### COUNTIES OF—

Pontiac.	Missisquoi.	Compton.
Ottawa.	Brome.	Wolfe and Richmond.
Argenteuil.	Shefford.	Megantic.
Huntingdon.	Stanstead.	
Town of Sherbrooke.		

## THE THIRD SCHEDULE.

*Provincial Public Works and Property to be the Property of Canada.*

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.
6. Railways and Railway Stocks, Mortgages, and other Debts due by Railway Companies.
7. Military Roads.
8. Custom Houses, Post Offices, and all other Public Buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.
9. Property transferred by the Imperial Government, and known as Ordnance Property.
10. Armouries, Drill Sheds, Military Clothing, and Munitions of War, and Land set apart for general public purposes.

## THE FOURTH SCHEDULE.

*Assets to be the Property of Ontario and Quebec conjointly.*

Upper Canada Building Fund.  
 Lunatic Asylums.  
 Normal School.  
 Court Houses, )  
                   in                    )  
 Aylmer.                    Lower Canada.  
 Montreal.                    )  
 Kamouraska.                    )  
 Law Society, Upper Canada.  
 Montreal Turnpike Trust.  
 University Permanent Fund.  
 Royal Institution.  
 Consolidated Municipal Loan Fund, Upper Canada.  
 Consolidated Municipal Loan Fund, Lower Canada.  
 Agricultural Society, Upper Canada.  
 Lower Canada Legislative Grant.  
 Quebec Fire Loan.  
 Temiscouata Advance Account.  
 Quebec Turnpike Trust.  
 Education—East.  
 Building and Jury Fund, Lower Canada.  
 Municipalities Fund.  
 Lower Canada Superior Education Income Fund.

## THE FIFTH SCHEDULE.

## OATH OF ALLEGIANCE.

I, A. B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

*Note.—The Name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time, with proper terms of reference thereto.*

## DECLARATION OF QUALIFICATION.

I, A. B. do declare and testify, That I am by law duly qualified to be appointed a member of the Senate of Canada [or as the case

may be], and that I am legally or equitably seised as of freehold for my own use and benefit of lands or tenements held in free and common socage [or seised or possessed for my own use and benefit of lands or tenements held in franc-alieu or in roture (or as the case may be),] in the Province of Nova Scotia [or as the case may be] of the value of four thousand dollars over and above all rents, dues, debts, mortgages, charges, and incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a title to or become possessed of the said lands and tenements or any part thereof for the purpose of enabling me to become a member of the Senate of Canada [or as the case may be], and that my real and personal property are together worth four thousand dollars over and above my debts and liabilities.

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## IMP. ACT, 34 VICT. cap. 28.

An Act respecting the establishment of Provinces  
in the Dominion of Canada.

[29th June, 1871.]

**W**HEREAS doubts have been entertained respecting the powers of the Parliament of Canada to establish Provinces in territories admitted, or which may hereafter be admitted, into the Dominion of Canada, and to provide for the representation of such Provinces in the said Parliament, and it is expedient to remove such doubts, and to vest such powers in the said Parliament :

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords, Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows :

Short Title.

1. This Act may be cited for all purposes as "The British North America Act, 1871."

Parliament of  
Canada may  
establish new  
Provinces, and  
provide for the  
constitution,  
etc., thereof.

2. The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order and good government of such Province, and for its representation in the said Parliament.

3. The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Provinces, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

*Alteration of limits of Provinces.*

4. The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province.

*Parliament of Canada may legislate for any territory not included in a Province.*

5. The following Acts passed by the said Parliament of Canada, and intituled respectively :

*Confirmation of Acts of Parliament of Canada.*

“An Act for the temporary government of Rupert’s  
“Land and the North-Western territory when  
“united with Canada;” and

*32 and 33 Vic. (Canadian) cap. 3.*

“An Act to amend and continue the Act thirty-two  
“and thirty-three Victoria, chapter three, and  
“to establish and provide for the government  
“of the Province of Manitoba,”

*33 Vic. (Canadian) cap. 3.*

shall be and shall be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen’s name, of the Governor-General of the said Dominion of Canada.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new

*Limitation of powers of Parliament of Canada to legislate for an established Province.*



Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

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IMP. ACT, 38 & 39 VICT. cap. 38.

An Act to remove certain doubts with respect to the powers of the Parliament of Canada, under section eighteen of the British North America Act, 1867.

[19th July, 1875.]

WHEREAS by section eighteen of the British North America Act, 1867, it is provided as follows:—<sup>30 and 31 Vic. c. 3.</sup>

“The privileges, immunities, and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.”

And whereas doubts have arisen with regard to the power of defining by an Act of the Parliament of Canada, in pursuance of the said section, the said privileges, powers or immunities; and it is expedient to remove such doubts:

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Substitution  
of new section  
for section 18  
of 30 and 31  
Vic., c. 3.

1. Section eighteen of the British North America Act, 1867, is hereby repealed, without prejudice to anything done under that section, and the following section shall be substituted for the section so repealed.

The privileges, immunities and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

Confirmation  
of Act of  
Parliament of  
Canada.

2. The Act of the Parliament of Canada passed in the thirty-first year of the reign of Her present Majesty, chapter twenty-four, intituled "An Act to provide for oaths to witnesses being administered in certain cases for the purposes of either House of Parliament," shall be deemed to be valid, and to have been valid as from the date at which the royal assent was given thereto by the Governor-General of the Dominion of Canada.

Short title.

3. This Act may be cited as the Parliament of Canada Act, 1875.

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## [PRIVY COUNCIL.]

OUR SOVEREIGN LADY THE QUEEN.....*Appellant,*

AND

EDWARD COOTE.....*Respondent.*

\*J. C.

1873

March 11.

*On Appeal from the Court of Queen's Bench for the Province of Quebec, Canada.*

[*Reported L. R. 4 P. C. 599.*]

By the Statutes of the Quebec Legislature 31 Vict. c. 32, and 32 Vict. c. 29, Fire Commissioners or Marshals were appointed with power to investigate the origin of any fires occurring in the Cities of Quebec and Montreal; to compel the attendance of witnesses, and examine them on oath; and to commit to prison any witnesses refusing to answer without just cause. Held, that these Statutes were within the competency of the Provincial Legislature.

On petition by the Attorney-General of the Province of Quebec, special leave was granted to appeal from a judgment of the Queen's Bench, Quebec, on a case reserved in a trial for felony.

In this case special leave to appeal was granted from a judgment of the Court of Queen's Bench of the Province of Quebec on a case reserved for that Court by Mr. Justice Badgley, under the powers of the Consolidated Statutes of Lower Canada, c. 77, ss. 57, 58, on a trial of the Respondent for Arson.

The case so reserved, after stating that the prisoner had been tried and found guilty, proceeded as follows: "In the course of the adduction of the evidence for the Crown, two depositions made and sworn to by the

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\* Present:—Sir James W. Colville, Sir Barnes Peacock, the Lord Justice Mellish, Sir Montague E. Smith, and Sir Robert P. Collier.

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v.  
COOTE.  
STATEMENT.

prisoner, with his signature subscribed to each, taken by the Fire Commissioners at their investigation into the cause and origin of the fire at his warehouse, before any charge or accusation against him or any other person had been made, were produced in evidence, and which, after having been duly proved, were submitted to the jury as evidence against him, after the objection previously made by the prisoner to their production in evidence and after his said objection had been overruled; after the conviction of the prisoner and before sentence was pronounced by me thereon, he moved the Court by two motions filed in Court in the terms following."

The case then set out the two motions, of which the first is immaterial as Mr. Justice Badgley rejected it, and reserved no question respecting it; the second was in the following terms:—

"Motion on behalf of the said Edward Coote, that judgment upon the said indictment, and upon a verdict of guilty thereon, rendered against him be arrested, and that the said verdict be quashed and set aside, and the said defendant, to wit, the said Edward Coote be relieved therefrom, for, among others, the following reasons."

A great many reasons were then set out, the only ones material to the present Appeal being, that the two depositions were inadmissible in evidence, because the Fire Commissioners before whom they were taken had no authority to administer an oath, or take such depositions, and such depositions were not admissible as statements made by the prisoner, because they were not made freely and voluntarily and without compulsion or fear, and without the obligation of an oath.

The reserved case came on for argument in the Court of Queen's Bench, Appeal side, before the Chief Justice

Duval, and the Justices Caron, Drummond, Badgley and Monk; and on the 15th of March, 1872, the Court gave judgment in the following terms:

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—  
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"After hearing counsel, as well on behalf of the prisoner as for the Crown, and due deliberation had, on the case transmitted to this Court from the Court of Queen's Bench, sitting on the Crown side, at Montreal, it is considered, adjudged, and finally determined by the Court now here, pursuant to the Statute in that behalf, that an entry be made on the Record to the effect that in the opinion of this Court the production of the depositions made by the prisoner before the Fire Commissioners at Montreal was illegal, and, therefore, that the evidence adduced on the part of our Sovereign Lady the Queen does not justify the verdict, which is hereby quashed and set aside.

"But this Court, considering that the conviction is declared to be bad from a cause not depending upon the merits of the case, does hereby order that the said prisoner, Edward Coote, be tried anew on the indictment found and now pending against him, as if no trial had been had in the case; and that for the purpose of standing such new trial he be bound over in sufficient recognizance to appear on the first day of the next ensuing term of the Court of Queen's Bench, sitting on the Crown side, at Montreal, and thereafter from day to day, until duly discharged."

From this judgment the Justices Badgley and Monk dissented.

The prisoner was discharged on his recognizance to appear on the new trial.

An application, made by the Attorney General for the Province of Quebec to the Court of Queen's Bench, for leave to appeal to Her Majesty in Council was refused. A petition was then presented by the Attorney General

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of Quebec to the Queen in Council, praying for special leave to appeal from the above judgment. The petition was heard by the Judicial Committee on the 30th of April, 1872. Their Lordships granted the application, and by an order in Council dated 10th May, 1872, special leave to appeal from the judgment of the Court of Queen's Bench of 15th March, 1872, was granted.

As no appearance was entered for the Respondent, the appeal was heard *ex parte*.

Sir John Karslake, Q.C. (Mr. H. M. Bompas with him), for the Appellant.

[The argument is not given, the same not having reference to the question on the B. N. A. Act.]

Judgment was now delivered by

SIR ROBERT COLLIER:—

*Edward Coote* (the Respondent) was convicted of Arson, subject to a question of law reserved by Mr. Justice *Badgley* (the Judge who presided at the trial) for the consideration of the Appeal side of the Court of Queen's Bench, in pursuance of c. 77, sec. 57 of the Consolidated Statutes of *Lower Canada*. The question reserved was whether or not the Prosecutor was entitled to read as evidence against the Prisoner depositions made by him under the following circumstances:—

An Act of the *Quebec* Legislature appointed officers named "Fire Marshals" for *Quebec* and *Montreal* respectively, with power to inquire into the cause and origin of fires occurring in those cities, and conferred upon each of them "all the powers of any Judge of Session, Recorder or Coroner, to summon before him and examine upon oath all persons whom he deemed capable of giving information or evidence touching or concerning such fire." These officers also had power, if

the evidence adduced afforded reasonable ground for believing that the fire was kindled by design, to arrest any suspected person, and to proceed to an examination of the case and committal of the accused for trial in the same manner as a Justice of the Peace.

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Upon an inquiry held in pursuance of this Statute as to the origin of a fire in a warehouse of which *Coote* was the occupier, he was examined on oath as a witness. No copy of his depositions accompanies the record; but their Lordships accept the following statement of Mr. Justice *Badgley* as to the circumstances under which they were taken :—

“Among the several persons examined respecting that fire was *Coote* himself, upon two occasions, at an interval of three or four days between his two appearances, on each of which he signed his deposition, taken in the usual manner of such proceedings, and which was attested by the Commissioners. Upon both occasions he acted voluntarily and without constraint; there was no charge or accusation against him or any other person; he was free to answer or not the questions put to him, and frequently exercised his privilege of refusing to answer such questions. Some days after the date of the latter deposition and after the final close of the inquiry, *Coote* was arrested upon the charge of arson of his premises, and duly committed for trial.”

At his trial the above-mentioned depositions were duly proved, and admitted in evidence, after being objected to by the Counsel for the prisoner. The objection taken at the trial appears to have been that to constitute such a Court as that of the Fire Marshal was beyond the power of the Provincial Legislature, and that consequently the depositions were illegally taken. Subsequently other objections were taken in arrest of



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judgment, and the question of the admissibility of the depositions was reserved. It was held by the whole Court (in their Lordships' opinion rightly) that the constitution of the Court of the "Fire Marshal," with the powers given to it, was within the competency of the Provincial Legislature; but it was further held by a majority of the Court that the depositions of the prisoner were not admissible against him, because they were taken upon oath, and because he was not cautioned that whatever he said might be given in evidence against him, after the manner in which Justices of the Peace are required to caution accused persons by an Act of the British Parliament adopted in this respect by the Colonial Legislature.

[The remainder of the judgment is not printed here, as it does not relate to the present question.]

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[PRIVY COUNCIL.]

L'UNION ST. JACQUES DE MONTREAL.....*Defendant;*

AND

DAME JULIE BELISLE.....*Plaintiff.*

\* J. C.

1874

July 8.

*On Appeal from the Court of Queen's Bench for the Province of Quebec, Canada (Appeal side).*

[*Reported L. R. 6 P. C. 31.*]

The Act of the Legislature of Quebec (33 Vict., c. 58), for the relief of the appellant society, then (as appeared on the face of the Act) in a state of extreme financial embarrassment, is within the legislative capacity of that Legislature.

The Act was held to relate to "a matter merely of a local or private nature in the Province," which, by the 92nd section of the B. N. A. Act, 1867, is assigned to the exclusive competency of the Provincial Legislature; and not to fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the B. N. A. Act reserved for the exclusive legislative authority of the Parliament of Canada.

The question decided in this appeal was whether the Act of the Provincial Legislature of Quebec (33 Vict., c. 58), is repugnant to the provisions of an Act of the Imperial Parliament, viz., the B. N. A. Act, 1867. The Provincial Act, 33 Vict., c. 58, is as follows:—

"AN ACT TO RELIEVE L'UNION ST. JACQUES DE  
MONTREAL.

"Whereas there exists in the City of Montreal a benefit and benevolent society, duly incorporated, under

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\* Present:—Lord Selborne, Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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the name of 'L'Union St. Jacques de Montreal;' whereas the contributions levied on the members of such society are too limited, and the benefits, especially those granted to the widows of deceased members, are by far too high; and whereas such disproportion between the contributions and the benefits has already reduced considerably the resources of the said society, remarkably encroached on its savings, and prevented the balancing of receipts and expenses, the latter having exceeded the former for more than three years; whereas the half of the widows of deceased members, to wit, two out of four, have understood such state of affairs, and have come to the relief of said society by agreeing to allow their weekly and life benefits to be lessened, and to exchange the same against the allowance of a sum to be once paid, and having not exceeded \$200 except for such of them who had not already received as such an equal sum of \$200; whereas it would be unjust and altogether injurious to the interests of the said society to continue to pay weekly and life benefits to the two widows having refused to comply with the terms offered to the other widows and by them accepted; and whereas the said two widows persisting in their refusal have already received in the way of ordinary benefits, a sum exceeding that of \$200; whereas it has been shewn that the financial condition of the said association does not permit of its continuing to pay to the two widows aforesaid their previous pensions, which, even if it were disposed, it could not do without entailing its own ruin; whereas the Act incorporating the said society does not allow to decree that the terms accepted by the two widows aforesaid shall be binding for all the widows of its deceased members; and whereas it is expedient to remedy such unfavourable state of affairs, as prayed for by the petition of the said society, and whereas it is just

that the prayer of the said petition be granted; therefore Her Majesty, by and with the advice and consent of the Legislature of Quebec, enacts as follows:

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"I. The said society, 'The Union St. Jacques of Montreal,' is hereby authorized to convert, in the ordinary manner and forms of its proceedings, the benefits of the said two widows, to wit: Dame Elizabeth Brunet, widow of the late Albert Tessier, and Dame Julie Belisle, widow of the late Prosper Tourville, into the sum of \$200 to be once paid to each and all of them.

"II. If the said two widows, or one of them, refuse to accept such sum, instead of their or her prior benefit, it shall be lawful for the said society to keep such sum or sums in trust, and they shall only be bound to pay the said widows, for all the benefits to which they were previously entitled, the legal interest on the said sum of \$200, that is to say, \$12 to each of them, the said interest payable monthly and in advance up to their re-marriage or till their death, if they remain in a state of widowhood; it shall, nevertheless, be lawful for the said widows to draw the said allowance of \$200 each, provided, of course, that they shall ask for it while in a state of widowhood.

"III. But if the said association, 'L'Union St. Jacques de Montreal' sees its condition improve, and becomes possessed of assets, amounting to \$10,000 in real estate, or in savings deposited in banks or otherwise invested, it shall be permissible to the two widows above named to demand from the said association the same contribution as heretofore (7s. 6d. per week), and also all arrears from this date, after deduction has been made of the \$200 and the interest received by them on the same."

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Under the B. N. A. Act, 1867, section 3, the provinces of Canada, Nova Scotia, and New Brunswick, form one dominion under the name of Canada, and under section 5, Canada is divided into four provinces, viz., Ontario, Quebec, Nova Scotia, and New Brunswick. A Parliament for Canada called the Dominion Parliament consisting of the Queen the Senate and the House of Commons is thereby established, and by section 71, a legislature for Quebec was established consisting of the Lieut.-Governor and of two Houses, styled the Legislative Council of Quebec and the Legislative Assembly of Quebec.

The material sections of the Act which effected the distribution of the legislative power as between the Dominion Parliament and the Local Legislature, are the 91st and the 92nd. By the former, so far as is material to this case to refer to it, it was provided that it should be lawful for the Queen, with the advice and consent of the Dominion Legislature, to make laws on all subjects not coming within the class of subjects by that Act assigned exclusively to the Legislatures of the Provinces, and for greater certainty, it was declared that the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within certain classes of subjects, to wit, *inter alia*, bankruptcy and insolvency; and that any matter coming within the said classes of subjects should not be deemed to come within the class of "matters of a local or private nature" mentioned in the next section. By the latter, it was provided that in each province the Local Legislature might exclusively make laws in relation to matters coming within certain classes of subjects therein mentioned, to wit, *inter alia*: 7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the

province, other than marine hospitals. 11. The incorporation of companies with provincial objects. 18. Property and civil rights in the province. 16. Generally all matters of a merely local or private nature in the province.

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The question arose in this way. The Respondent, on the 25th of August, 1870, sued the Appellant society in the Circuit Court for the district of Montreal, to recover an instalment of an annuity to which she was admittedly entitled under the rules of the society. By special plea, the Appellant pleaded that by the Provincial Act above set out it was authorized to pay to the Respondent the sum of \$200 in lieu of the benefits which she was entitled to receive from the society, and if she refused to accept it to place the sum in deposit, and pay to the Respondent the interest, viz. \$12 a year monthly in advance during her life, or till her second marriage; and that the society had, at a general meeting, on the 10th of March, 1870, resolved to avail itself of the Act, and that it had always been ready and willing to pay the arrears to that date. The Respondent answered, that the Provincial Act should be declared illegal and unconstitutional. The Judge (Torrance, J.), on the 30th of November, 1870, gave judgment overruling the Appellant's plea (15 L. C. J. 212). This judgment was affirmed on the 20th of September, 1872, by the Court of Queen's Bench\* (Duval, C. J., Drummond and Monk, JJ., Caron, and Badgley, JJ., dissenting). The majority of the Judges considered that the Provincial Legislature in passing the Act, had legislated on a matter coming within the class of "insolvency," which belonged under the 91st section of the B. N. A. Act, 1867, to the exclusive authority of the Parliament of Canada.

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\* See post, p. 72.

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Sir W. Harcourt, Q.C., and Mr. Bompas, for the Appellant.

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Mr. Benjamin, Q.C., and Mr. F. W. Gibbs, for the Respondent.

The judgment of their Lordships was delivered by LORD SELBORNE :—

The sole question in this appeal is this: whether the subject matter of the Provincial Act (33 Vict. c. 58), is one of those which by the 91st section of the Dominion Act are reserved exclusively for legislation by the Dominion Legislature. The scheme of the 91st and 92nd sections is this. By the 91st section some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters except those afterwards dealt with by the 92nd section—their Lordships do not decide it, but for the argument's sake they will assume it; certain matters, being upon that assumption all those which are not mentioned in the 92nd section, are reserved for the exclusive legislation of the Parliament of Canada, called the Dominion Parliament; but beyond controversy there are certain other matters, not only not reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the Provincial Legislature in each province. Among those the last is thus expressed: "Generally all matters of a merely local or private nature in the province." If there is nothing to control that in the 91st section, it would seem manifest that the subject matter of this Act, the 33 Vict. c. 58, is a matter of a merely local or private nature in the province, because it relates to a benevolent or benefit society incorporated in the city of Montreal within the province, which appears to consist exclusively of members who would be subject *prima facie* to the control of the Pro-

vincial Legislature. This Act deals solely with the affairs of that particular society, and in this manner:—taking notice of a certain state of embarrassment resulting from what it describes in substance as improvident regulations of the society, it imposes a forced commutation of their existing rights upon two widows, who at the time when that Act was passed were annuitants of the society under its rules, reserving to them the rights so cut down in the future possible event of the improvement up to a certain point of the affairs of the association. Clearly this matter is private; clearly it is local, so far as locality is to be considered, because it is in the province and in the city of Montreal; and unless, therefore, the general effect of that head of sect. 92 is for this purpose qualified by something in sect. 91, it is a matter not only within the competency, but within the exclusive competency of the Provincial Legislature. Now sect. 91 qualifies it undoubtedly, if it be within any one of the different classes of subjects there specially enumerated; because the last and concluding words of sect. 91 are: “And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.” But the *onus* is on the respondent to shew that this, being of itself of a local or private nature, does also come within one or more of the classes of subjects specially enumerated in the 91st section.

Now it has not been alleged that it comes within any other class of the subjects so enumerated except the 21st, “Bankruptcy and Insolvency;” and the question therefore is, whether this is a matter coming under that class 21, of bankruptcy and insolvency? Their Lord-

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ships observe that the scheme of enumeration in that section is, to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may be properly described as general legislation; such legislation as is well expressed by Mr. Justice Caron when he speaks of the general laws governing Faillite, bankruptcy and insolvency, all which are well known legal terms expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation. Well, no such general law covering this particular Association is alleged ever to have been passed by the Dominion. The hypothesis was suggested in argument by Mr. Benjamin, who certainly argued this case with his usual ingenuity and force, of a law having been previously passed by the Dominion Legislature, to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions assumed to be exactly those which appear upon the face of this statute, should thereupon, *ipso facto*, fall under the legal administration in bankruptcy or insolvency. Their Lordships are by no means prepared to say that if any such law as that had been passed by the Dominion Legislature, it would have been beyond their competency; nor that, if it had been so passed, it would have been within the competency of the Provincial Legislature afterwards to take a particular

association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency. But no such law ever has been passed; and to suggest the possibility of such a law as a reason why the power of the Provincial Legislature over this local and private association should be in abeyance or altogether taken away, is to make a suggestion which, if followed up to its consequences, would go very far to destroy that power in all cases.

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It was suggested, perhaps not very accurately, in the course of the argument, that upon the same principle no part of the land in the province upon the sea coasts could be dealt with, because, by possibility, it might be required for a lighthouse, and an Act might be passed by the Dominion Legislature to make a lighthouse there. That was not a happy illustration, because the whole of the sea coast is put within the exclusive cognizance of the Dominion Legislature by another article; but the principle of the illustration may be transferred to Article 7, which gives to the Dominion the exclusive right of legislating as to all matters coming under the head of "militia, military and naval service, and defence." Any part of the land in the Province of Quebec might be taken by the Dominion Legislature for the purpose of military defence; and the argument is, if pushed to its consequences, that because this which has not been done as to some particular land might possibly have been done, therefore, it not having been done, all power over that land, and therefore over all the land in the province, is taken away, so far as relates to legislation concerning matters of a merely local or private nature. That, their Lordships think, is neither a necessary or reasonable, nor a just and proper construction. The fact that this particular society appears upon the face of

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the Provincial Act to have been in a state of embarrassment, and in such a financial condition that, unless relieved by legislation, it might have been likely to come to ruin, does not prove that it was in any legal sense within the category of insolvency. And in point of fact the whole tendency of the Act is to keep it out of that category, and not to bring it into it. The Act does not terminate the company; it does not propose a final distribution of its assets on the footing of insolvency or bankruptcy; it does not wind it up. On the contrary, it contemplates its going on, and possibly at some future time recovering its prosperity, and then these creditors, who seem on the face of the Act to be somewhat summarily interfered with, are to be reinstated.

Their Lordships are clearly of opinion that this is not an Act relating to bankruptcy and insolvency, and will therefore humbly advise Her Majesty that this appeal be allowed, that the judgment of the Court of Queen's Bench (Canada) ought to be reversed, and that the suit be dismissed. There will be no costs of this appeal.

Judgment reversed.

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*Judgments in Court of Queen's Bench.*

[Reported 20 L. C. J. 29.]

BADGLEY, J.:—

Several years before the Imperial enactment of 1867, which constituted the present Dominion Government of Canada, out of the then four British American Provinces, a Friendly Society had been established at Montreal, in Lower Canada, called *Union St. Jacques de Montreal*, by charitably disposed persons, having for its object "the aid of its members in cases of sickness, and the ensuring of like assistance to the widows and children of deceased members." By-laws expedient and necessary for the interests and administration of the affairs of the Society were made, which fixed the relief to be

given and the classes of its beneficiaries to receive it, amongst whom were, during their widowhood, the widows of deceased members of a certain standing in the Society. The funds were derived from the periodical contributions of its members, whilst connected with the Society. The Institution had been in operation for some years when its members applied to the Provincial Legislature of the time, and obtained an Act of Incorporation for the Society, under its original name and formation, and for its original purpose and object of a merely Eleemosynary Society. The Act of Incorporation merged the original Society into the Incorporated Institution. The diminished resources of the Society preventing the continuance to its beneficiaries of their then allowances, and amongst them those of the four widows borne upon the funds of the establishment, the Society proposed to them to convert their allowances into the fixed sum of \$200, to be once paid to each of them, with the right to receive their full allowance if thereafter the assets of the Society should reach ten thousand dollars. The proposition was at once accepted by two of them, and upon the refusal of the others, the Provincial Legislature of Quebec, formerly Lower Canada, upon the application of the Society, passed the Provincial Act 83 Vict., ch. 58, "An Act to relieve the Union St. Jacques of Montreal," which gave effect to the proposition above mentioned in respect of its beneficiary widows. The widow Belisle, one of the refusing widows, thereupon instituted an action against the Society for her weekly allowances, claimed to be due to her since the first of February, 1870, the date of the passing of the Provincial Act, to the following first of August, for \$43.50, to which the Society pleaded the Provincial Act in bar of the action. The Circuit Court overruled the plea, upon the grounds, first, that the legislative authority of the Dominion Parliament extended over all matters of insolvency; and second, that the Provincial Legislature had no power to legislate, as by this Act, by which the respondent, *in view of the inability of the Society to meet their engagements, was compelled to compound her said claim of seven shillings and sixpence per week, during her widowhood, for the sum of two hundred dollars, once paid.*

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Two questions follow upon this contestation: the first, the right of the Provincial Legislature of Quebec to pass the Act in question, which is alleged to involve the insolvency of the Society; and the second, the jurisdiction of the Circuit Court to annul a Provincial Act sanctioned by the constituted authority in the Dominion for

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that effect, and not disallowed in the manner provided by the Dominion Act, the Constitution of the country.

The first question, the extent of the powers intrusted to the Provincial Legislature, necessarily requires reference to the legislative power intrusted exclusively to the Dominion Legislature. Now, by the Dominion Act, it is common knowledge that the several provinces which compose the Dominion Government have each of them local Legislatures, and that by the Act under which these exist, as well as that of the Dominion itself, the powers and rights belonging to each have been defined and established, and are in that sense constitutional. It may be observed that the Dominion legislative powers are, to use a common expression, supreme in all matters of a general nature which are specifically confided to the action of the general or Dominion legislature, subject only in its legislative acts to the Imperial reservations contained in the Imperial Act for the Dominion, and amongst others to the signification of the pleasure of the Sovereign as to its legislative enactments, and their disallowance within two years, as expressly provided by the Dominion Act. Beyond this, the legislative powers of the Dominion are supreme throughout the Dominion, and acknowledge no power, judicial or otherwise, to interfere with them when applied to the general matters enumerated as exclusively within the Dominion legislative purview. Its legislative powers within the limits are exclusive, and govern and extend over the provinces composing the Dominion. These matters are plainly and explicitly indicated as classes of matters of a general nature, and the Dominion legislative acts as to these are only subjected to the provisions of the Dominion Act; amongst others, to their sanction by the Governor-General in the name of the Crown, His Excellency's reservation of Acts for the signification of the Royal pleasure thereon, and their Imperial disallowance within two years after their receipt by the Imperial Secretary of State. In like manner, the Dominion Act has provided for the legislative powers of the several provinces, and the same care has been taken to specify their extent and objects, which necessarily are simply local and not within the general Dominion powers. The Provincial Legislatures within their own boundaries freely exercise the powers intrusted to them under the Dominion Act, which gave them their provincial constitutions, and in which and for which they are as supreme and exclusive as the general Legislature itself, but, like the Dominion, the Provincial Legislatures are likewise subject to the reservations in respect to their legislative acts, namely, the

assent to them by their local Governor, their reservation for the assent of the Governor-General instead of the Sovereign, and their disallowance by the Governor-General, not the Sovereign, within one year, not two as provided for the Dominion Acts. Beyond these reservations the legislative Acts of the Provincial Legislature, within the enumerated local matters for their action, are supreme and coercive upon all within the extent of the Province. These Provincial powers are as exclusive as those of the Dominion; when not disallowed, therefore, by the Governor-General, Provincial legislation is supreme, and binds as law throughout and within the provincial purview.

Our examination of the Dominion Act, and of its intended scope and purpose, indicates the necessary legislative theory upon which its provisions in this respect are founded. The establishment of the general Dominion Government necessarily carried with it exclusive legislation by the Dominion upon the general classes of matters affecting the Dominion of the four Provinces, whilst the establishment of the several local or provincial Legislatures as necessarily drew to each its legislative power upon local matters within each province. The theory of the general legislative powers of the Dominion is expressly general in the enactment of general laws upon its exclusive subjects enumerated for its action. The 91st Section of the Act provides for the legislative authority of the Parliament of Canada, *to make laws for the peace, order and good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the Provincial Legislatures*, and for greater certainty that authority is declared to extend to all matters coming within the classes of subjects enumerated in the Dominion Act, namely, amongst others, the Public Debt and Property, Regulation of Trade and Commerce, Postal Service, Navigation and Shipping, Currency and Coinage, Weights and Measures, Patents, Copyrights, Naturalization, etc., Bankruptcy and Insolvency, the Criminal Laws and Procedure, and any matters coming within any of the enumerated classes of subjects in this Section. The principle of the theory of the Dominion legislation for general subjects exclusively, stands out in bold relief by merely going over the list of the enumerated general subjects attributed to the general Legislature. The 92nd Section enacts that in each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects therein enumerated, namely, amongst others, Direct Taxation within the Province, the Amendment of the Pro-

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vincial Constitution, Public Lands of the Province, Reformatory Prisons. 7. The establishment, maintenance and management of Hospitals, Asylums, Charities and Eleemosynary institutions in and for the Province, other than Marine Hospitals. 11. The incorporation of Companies with provincial objects. 13. Property and civil rights in the Province; and 16, generally all matters of a merely local or private nature in the Province. Looking to the enumerated subjects of legislation exclusively belonging to each Legislature, the division between the general and local subjects is apparent and manifest.

Now, with reference to the contested provincial enactment, looking to its object and intent, and comparing these with the legislative powers intrusted to the Local or Provincial Legislature of Quebec, it cannot be denied that the appellant, the Corporation of the Union St. Jacques, is of the *eleemosynary character, classed in the 7th sub-section, that it does fall within the terms of the 13th Section as to property and civil rights in the province*, and that it is not excluded from the general terms of "*a matter of a merely local or private nature in the province.*" As included then manifestly within these local subjects, the Provincial Legislature has passed this Act, simply as a settlement of claims upon the diminished funds of the Society, between the Society and its beneficiaries, with the view of the maintenance and management of the Union as a continuing corporation, the Act involving in its provisions private property and civil rights in the province, and a matter of a merely local or private nature, which its provisions have regulated between the parties in the manner proposed and contemplated by its managers, as a settlement enforced under the provisions of the Act. I would merely add that, as between the Corporation and the recalcitrant beneficiaries, including the respondent, considering the Act of Incorporation as nothing more *than a legislative contract* touching property and rights between them, even as such and to that extent, the Act is manifestly within Provincial Legislative powers, which do not in the compulsory settlement of the contract between the parties, necessarily fall within the exclusive powers of the general legislature, as for bankruptcy and insolvency. The objection raised upon this point is the only one which has a shadow of plausibility about it, and yet it is manifestly untenable and unfounded.

This kind of legislation has been by no means uncommon. The Statute Books of the former Legislature of Lower Canada, now Quebec, and of the united provinces of Upper Canada and Lower

Canada, are full of Statutes of this private nature for settling of Estates, construing terms and conditions of Wills and Testaments, explaining Contracts, &c., &c., and none of them have ever given rise to doubts as to their constitutionality or to litigation on that head before the Provincial Courts of Justice, after they had been duly sanctioned by proper authority.

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The Provincial Act in itself may also be tested with reference to its subjection of the enumerated exclusive subject of Bankruptcy and Insolvency attributed exclusively to the Dominion Legislature, by the fact, that the Dominion has made a general law upon the Statutory subject, the provisions of which apply to this contention. A Statutory Bankruptcy and Insolvent Legislation had been in force in the two Canadas since the first Insolvent Act of 1864, which was continued with amendments to the time of the making of the Dominion Law for Insolvency in 1869, which repealed the Provincial enactments and substituted a general Dominion Law upon the subject. By the Provincial Act of 1864, the first section specially enacts that "*the Act should apply in Lower Canada to traders only,*" "*and in Upper Canada to all persons whether traders or not,*" and this provision was not interfered with in the subsequent statutory amendments of that Provincial Act.

By the Dominion "Act respecting Insolvency" of 1869, the Lower Canada statutory restriction is extended throughout the Dominion of the four Provinces, and it is enacted by the first section of the Dominion Act of 1869, "This Act shall apply to traders only." Now it is nothing but just to read the general subject of Bankruptcy and Insolvency by the light of the Dominion Legislature itself, as indicating the intent of that Legislature as to the enumerated subjects for its action, and it becomes undeniable, therefore, that the Society, the appellant, here comes within the express limitation and restriction of the general law, and being neither in character nor purpose commercial nor a trader, and solely and simply what it has always been, a charitable and eleemosynary institution in and for the Province of Quebec, the Provincial enactment for its relief can, under no circumstances, be brought within the operation of the laws of Bankruptcy and Insolvency attributed to the Dominion Legislature, and as explained by its own general enactment.

It is not my intention to examine the special provisions of the Act in question, because, assuming the Act to be within the local legislative powers, and as to its subject matter or inducement not conflicting



L'UNION ST. with the general exclusive power of the Dominion as to the general  
 JACQUES laws of bankruptcy and insolvency, it is necessarily constitutional,  
 v. and therefore, as a necessary result, its provisions must be obeyed  
 BELISLE, and observed even by Courts of Justice, as being within the class of  
 Q. B., Quebec. matters within the action and powers of the Provincial Legislature.  
 Badgley, J. I will merely add that it has received its proper sanction by the  
 Provincial Governor, it has not been disallowed by the Governor-  
 General—the only constitutional authority capable of setting it  
 aside or invalidating it—and that it stands recorded amongst the  
 provincial statutes of Quebec as an effective provincial statute and  
 law, with legal attributes for its existence within its province, equal  
 to those of any Dominion or Imperial statute in the Dominion or  
 in Great Britain. In the face then of these supreme powers within  
 the purview of its jurisdiction, the Province of Quebec, what legal  
 authority has been given to the Provincial Courts of Justice or to  
 their judges individually to deny to the Provincial Legislature the  
 supreme power in its result, to enact and pass this Provincial Act?  
 It is manifest that the Provincial Act in question here, like all other  
 Legislative Acts which come before the constituted judiciary, are  
 only subjects of interpretation, and only as such can be examined  
 and treated by Courts of Justice, which are stopped at interpreta-  
 tion, because any beyond that as to legislative acts is legislation,  
 which it is idle to say Courts of Justice have no authority to exercise.  
 Their mission ends where legislation begins, and, therefore, it is of  
 primary importance to keep Courts of Justice within the bounds  
 limited by law for subjects such as these. The powers of the judi-  
 ciary in such a case can only be interpretative, certainly not dis-  
 allowing; and as this Act was within the local powers and did not  
 conflict with the general powers, and was not disallowed by the  
 Dominion Executive, the only competent or qualified authority for  
 that purpose, the judgment of the C. C. is nothing less than an  
 unauthorized judicial repeal of the legislative act. It is objected  
 that it is an interference with the law of contracts between the society  
 and the beneficiary, but even in that case the judiciary have no  
 repealing power; they may interpret, but cannot ignore or set aside  
 a legally constituted law—in such case the judiciary are powerless.  
 It may not have been a right thing to do, it may even have been  
 unprecedented; of this I am not called upon to express my opinion,  
 but the Provincial Legislature notwithstanding had the power to do  
 it, and acted upon their powers. The parties interested had their  
 recourse—they should have applied in time to the Dominion Execu-

tive to exercise its power of disallowance ; there is no other legal mode of evading an existing Act, and if that course is not applied for or not adopted, the Act, of necessity, stands supreme as a law. Assuming then, that the Act is, in all respects, valid and constitutional, the rules for the guidance of the judiciary, as applicable in Great Britain in respect of legislative acts, also govern here. Dwarria, at page 647, says, "The general and received doctrine certainly is, that an Act of Parliament, of which the terms are explicit and the meaning plain, cannot be questioned, or its authority contradicted in any Court of Justice." Even in the United States, where the Constitution has given to the Judicature the power and right of examining their legislative acts, that power is restricted to the discovery of violations of the Constitution or of its provisions ; but at the same time they all admit, as a settled principle, that the Legislature is the supreme power in the State, and if the Act be within the Constitution—in other words, within the powers attributed to the exercise of the action of the Legislature—it is paramount to all judicial authority, and perforce must be obeyed by Courts of Justice, who are only the ministers and expounders, and not the makers of existing laws. It is within the principle of the supreme power of the Legislature that what are denominated private Acts of Parliament, introduced and passed for the settlement of particular matters or estates, are not only considered, but at the same time upheld as common assurances amongst those interested in their provisions, but do not go beyond to strangers or parties not interested in them, the rule being founded in wisdom and justice, because as it is laid down, "every person is considered as assenting to a public Act, yet he is not so far a party as to give up his interest." It is true this Act may be called a private Act, although it is designated as a public Act by the Legislature ; yet it may be observed that however supreme the power of the Legislature may be in such cases of binding private rights by Acts of Parliament, caution should be duly exercised in reference to them. Still, whether public or private, the Act is existing law, and in a case of an Act of the Legislature of Ontario, such a private Act as this was upheld by the Court of Appeals for that Province. There it was an Act by which an important condition of a duly executed and recognized will was set aside and controlled by an Act of that Legislature, which, like this, was assented to and stood allowed. I refer to the case of the will of the late Hon. Mr. Goodhue.\* Chief Justice Draper and five

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[\* In re Goodhue, 19 Grant, 372.]

L'UNION St. other Judges of the Court concurred in opinion as to the legislative  
 JACQUES validity of the Act, although they differed as to the expression  
 v. and interpretation of the terms enacted in it. I cannot do better  
 BELISLE. than repeat some of the citations made in that case as to the  
 Q. B., Quebec. assumption by Courts of Justice to override a legislative act. In  
 Badgley, J. Logan v. Burslem, (1) Lord Campbell says: "As to what has  
 been said as to a law not binding if it be contrary to reason,  
 that can receive no countenance from any Court of Justice whatever.  
 A Court of Justice cannot set itself above the Legislature. It must  
 suppose that what the Legislature has enacted is reasonable, and all  
 therefore that we can do is to try to find out what the Legislature  
 intended. If a literal translation or construction of the words  
 would lead to an injustice or absurdity, another construction possi-  
 bly might be put on them, but still it is a question of construction  
 —there is no power of dispensation from the words used by the  
 Legislature." Mr. Sedgwick, in his treatise upon Statutory and  
 Constitutional Law, argues unanswerably that the judiciary have no  
 right whatever to set aside, or arrest or nullify, a law passed in rela-  
 tion to a subject within the scope of legislative authority, on the  
 ground that it conflicts with their notions of natural right, abstract  
 justice or sound morality, p. 187. And Chancellor Kent, 1 Com.  
 408, writes, "Where it is said that a statute is contrary to natural  
 equity or reason, or repugnant, or impossible to be performed, the  
 cases are understood to mean that the Court is to give them a  
 reasonable construction. They will not, out of respect and duty to  
 the lawgiver, presume that every unjust or absurd consequence was  
 within the contemplation of the law, but if it should happen to be  
 too palpable to meet with but one construction, there is no doubt in  
 the English law of the binding efficacy of the statute." To the  
 opinions of these able men might be added those of other eminent  
 jurists, Sir W. Blackstone, for example, amongst the number, who  
 fully corroborate what is above stated. Now, if unreasonable Acts  
 of Parliament are not thus, by authorities cited, allowed to be set  
 aside by Courts of Justice, because, as old Chief Justice Hale,  
 cited by Dwarria, says, "it was *magis congruum* that Acts of Parlia-  
 ment should be corrected by the same pen that drew them, than be  
 dashed to pieces by the opinion of a few judges;" or, as observed  
 by Lord Chancellor Ellesmere, "that when the three estates have  
 "spent their labour in making a law, three judges on the bench  
 "shall destroy and frustrate their pains, advancing the reason of a

"particular Court above the judgment of all the realm," it is manifest that an Act within the precise power of the Provincial Legislature to enact, cannot be ignored by our Courts of Justice.

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There is nothing, therefore, to sustain the opinion that the Provincial Courts have jurisdiction to override or set aside Provincial legislative acts coming within the classes of matters as above enumerated in the 92nd section of the Dominion Act. And here I may be again permitted to say, that as to the object of the Act in question, falling within the exclusive power of Dominion legislation as being a matter of bankruptcy and insolvency reserved for the Dominion Legislature, Judge Caron has fully answered this objection, and I shall not further remark upon it. Upon the whole, I consider that the Statutes of the Quebec Legislature are binding upon all the residents in the Province, when made in relation to the [matters within the jurisdiction of] the Provincial Legislature; that the Statute in question in this case is valid and binding upon the parties affected thereby, and upon this and all Courts of Justice of Quebec; and that the judgment of the Circuit Court, to use its own expression, is unconstitutional, and in effect and fact an unauthorized judicial repeal of the Act, and an illegal assumption of disallowance only left to the Governor-General; and therefore that the judgment appealed from is incorrect and ought to be set aside.

[Translated.]

CARON, J. :—

There is nothing extraordinary in the Act of Incorporation in question in this cause; it contains the clauses generally found in Acts of this kind, and it is certain that the Legislature which passed it had jurisdiction to do so. Now, if the Legislature had this jurisdiction, it had equally the right to modify it on the petition of those interested, unless this power had been taken away by a power superior to its own.

This is what the respondent asserts, supported in this assertion by the judgment appealed from, which declares that the Imperial Statute (the Act of Union) has deprived our Legislature of the right to pass enactments on the subjects governed by the Act of Incorporation pleaded by the respondent; the appellant maintains the contrary. The question to be determined is, whether this Imperial Act has in fact taken away from our Legislature the power of making in the Act of Incorporation in question the changes and modifications of which the respondent complains, and which she maintains are void and of no effect.

L'UNION St. I am of opinion that this has not been done. In passing the Act  
JACQUES of which the respondent complains, the bankruptcy laws have not  
v. been touched, under the dominion of which the Society in question  
BELISLE has never fallen. It appears absurd to assert that a society founded  
Q. B., Quebec. for such an object as this one is of a nature to be placed in bank-  
Caron, J. ruptcy or insolvency. No; this benevolent society, founded for  
the purpose of providing for the wants of the poor members belong-  
ing to it, found after some years' experience that the conditions  
imposed on them at their request were too burdensome, and would  
destroy the society and the object proposed in founding it, and  
then the members petitioned the Legislature to make the changes  
which they suggested, adapted to remedy their existing state  
of weakness and embarrassment. The Local Legislature, in grant-  
ing what was asked, has assuredly not touched the general laws  
regulating bankruptcy and insolvency; this Act is special, and has  
nothing in common with the general laws on these different subjects.

Suppose it were otherwise, and that, in fact, the Act in question  
related to this kind of law, it is not ascertained that the Society  
which petitioned for this Act was in truth in a state of insolvency  
and ruin; asking for changes to improve its position is not an  
admission that it was in such a state. Every day we see corpora-  
tions petitioning the Legislature for changes, and amendments to  
their charters, without its entering into any one's head to assert  
that this is a sign of bankruptcy or ruin.

It is the same in the present case. The Society has represented  
that the obligations which it has to fulfil are burdensome, and may  
hinder its prosperity and continuance, but this is not an allegation  
that it is in a state of ruin.

I would therefore reverse the judgment and dismiss the plaintiff's  
action.

Then at the fresh hearing in this cause, it has been suggested  
that it was not so much in consequence of the Imperial statute that  
the Local Legislature had no jurisdiction on the subject in question,  
but rather because the Act of amendment passed by the Local  
Legislature changes the rights conferred on members of the Society  
of St. Jacques, by their original Act of Incorporation; that, in  
virtue of that Act, the respondent had vested rights which the Act  
of amendment impaired, and that this rendered it void so far as  
the respondent was concerned.

This contention appears to me unreasonable; if it were admitted,  
banks and other companies, once they were incorporated, would

no longer be able to obtain any change in their charters, for the reason given in the present case, namely, that these changes, advantageous as they may be to the greater number of the shareholders, might affect the rights and interests of some among them, and that consequently, for fear of this, the Legislature should never grant an amendment to Acts of Incorporation.

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There is another observation to be made, which is, that if in truth the Society is insolvent or ruined, the law passed by the Local Legislature, and which the respondent complains of, is for the interest of the respondent, since in accepting these provisions the respondent will be able to receive thereby the sum fixed, in place of her annuity, while in that case she would run the risk of not being paid that annuity.

I remain, then, of opinion that the judgment should be reversed, and the plaintiff's action dismissed with costs.

DUVAL, C. J. :—

It is undoubtedly true that the authority of the Imperial Parliament is supreme, and, in its exercise, cannot be controlled by the judicial power. Such is the received doctrine in England. But can this be said of the Legislature of the Province of Quebec, whose powers are conferred by an Act of the Imperial Parliament, defined and limited in language generally admitting of little doubt? Unquestionably not. When the authority is supreme, it cannot be questioned, but when it is limited it is the duty of the judges to see that the limits prescribed have not been exceeded.

The powers conferred on our Provincial Legislature are defined by the Imperial Act, 30-31 Victoria, Chapter 3, paragraph 92, and the following.

On the subjects set forth in these paragraphs it may *legislate*, but no power is given to it to impair the obligation of contracts—a power which has ever been considered as contrary to every principle of sound legislation. In a free State, every man has a right to dispose of his property on his own terms, provided these are not contrary to law. The contract once made is as binding on the Legislature as it is on the individual. Applying this to the present case, I ask what would be said of an Act of the Legislature of Quebec, enacting that a man who had sold his house for fifteen hundred pounds should accept twelve hundred in full payment? And yet this is precisely the case before the Court. The Union St. Jacques entered into a contract with the husband of the respondent,

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by which it bound itself to pay a certain sum of money to the latter after the death of her husband, should she survive him. It is this amount which the widow claims, and which the Union St. Jacques refuses to pay.

Let not the authority of Blackstone be invoked, and his opinion expressed in volume 1, page 90, be referred to, "that if Parliament will positively do what is wrong," he knows of no power in the ordinary form of the Constitution that is vested with the authority to control it.

To this the limited power of our Legislature above mentioned is a conclusive answer. Admitting that the judicial power in England cannot interfere, but must blindly submit to superior and unlimited authority, can the same be said of a Legislature whose powers are defined and expressly limited? Another answer may be given, equally conclusive in my opinion. Judges are not to reason and lay down rules on suppositions, gratuitously made, for the purpose of creating embarrassment in the administration of justice. Mr. Justice Blackstone says: "If the Parliament does wrong, he knows of no power that can afford relief." I ask when has the Imperial Parliament interfered with private contracts? When State necessity has compelled such an interference, has not the contracting party been fully indemnified? Instead, therefore, of indulging in suppositions never realized, it is prudent for judges to reserve their opinions to be pronounced when the Legislature has committed the injustice, and not until then. From the above remarks, it is evident to me that the Legislature of Quebec has exceeded the boundary of legislation prescribed to it.

The question now to be decided is, Can this Court interfere? I can have no hesitation in answering "Yes." The same law which has prescribed boundaries to the Legislative power, has imposed upon the judges the duty of seeing that that power is not exceeded. Were it otherwise, the Courts of this country must enforce a compliance with an Act of the Local Legislature of Quebec in a matter expressly and exclusively delegated to the Parliament of Canada. Take, for instance, an Act of the Local Legislature on a matter within the classes of subjects set forth in the 91st paragraph, the Criminal Law among others,—would any judge sentence a man to the Penitentiary in virtue of an Act of the Local Legislature? Further, would the Courts acknowledge the binding obligation of an Act of the Local Legislature, on bankruptcy or insolvency; or of an Act conferring on a foreigner the rights of a natural-born

subject? Decidedly not. Then, where is the line of distinction to be drawn? What Acts of the Local Legislature are the Courts of Justice of this country bound to enforce, and what not? Their duty, in my opinion, is clearly and distinctly pointed out in the Act of the Imperial Parliament above referred to.

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It has been argued that the power of disallowing Acts of the Local Legislature is given by the Imperial Parliament to the Governor-General, and therefore that the Courts of Justice have no other duty to perform than that of yielding obedience to the Act. I confess that the extreme weakness of the argument on this point struck me as soon as the words were spoken. I could not believe that the Imperial Parliament had vested in the Governor-General the right of deciding on the legality of a law, and at the same time denied this right to the judges of the land. Such, I was certain, was not the spirit of English legislation. On reference to the Imperial Act, I find it affords not the slightest ground for such an argument.

MONK, J.:—

I agree with my colleagues, the Chief Justice and Mr. Justice Drummond, in this case.

At the time of the argument, I was inclined to the opinion expressed by Judges Caron and Badgley, but, upon careful consideration, I think we have the right, and that in fact it is our duty, to disregard a law of the Local Parliament if it be in conflict with the Imperial Act which confers a Constitution upon the Dominion. It is satisfactory to me to know that my brother Caron is also of that opinion, though he differs from the Court upon the ground that there is no conflict in this case. Several learned judges of the Dominion and many text-writers, whose decisions and authority are applicable to this case, uphold this view of our powers, and I therefore readily yield to what appears to be the more approved doctrine.

It is said that our decision will lead to consequences of the gravest character. If this be so, the fault is not ours; we have the Imperial Act, which undoubtedly we are bound to obey and to enforce. If we find a local law in conflict with its provisions, we have no more right to give that effect, than we should a by-law of the Corporation contrary to a local law.

But, assuming this doctrine as to the powers and duties of this



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Court to be sound, does this Act transgress the Dominion Act? Does there exist the conflict contended for by the respondent?

It is argued, and with considerable force, I think, that only general legislation on insolvency was reserved to the Dominion or Federal Parliament, and that this Act not possessing that character, it does not come within the prohibition. The law, however, does not, expressly or by clear implication, make that distinction, and, in that case, this Court would not probably feel justified in doing so. The local Act says in plain English that the *Union St. Jacques*, being insolvent, unable to meet its liabilities and engagements, and not being able to induce the respondent and other ladies to accept a composition, the power of the Local Parliament is invoked to legalize a reduction of the claims—in other words, to compel the interested parties to accept a forced composition. All this is said and enacted, in less precise, in milder words, yet, this is a concise statement of the case. The whole Act means insolvency and forced composition; nothing more and nothing less.

If this be true, then the letter of the Imperial Act is plainly violated, and although I have some doubts as to whether that statute meant to prohibit the Local Parliament from legislating on insolvency in matters of the nature brought before us, yet there is a judgment of the Court below, and my doubts are not strong enough to induce me to disturb it, more especially under the circumstances of this case.

DRUMMOND, J. :—

This is a case deserving more than ordinary consideration, not from the amount of money at stake, but from the importance of the constitutional question involved in it—namely, whether the Courts of this country have power, I would not say, in formal terms, to annul, but to refuse obedience to the commands of the manifold Legislative Bodies of this Dominion when they issue in matters with which the Imperial Parliament has given them no authority to deal, or inhibited them from interfering.

To explain the facts of the case and the grounds upon which the judgment appealed from was given, I avail myself of the observations made by his Honour Mr. Justice Torrance, because they express my opinion, my view of the whole matter, in clear and concise terms.

(His Honour read the remarks of TORRANCE, J., for which see 15 L. C. Jurist, p. 212.)

Remains the question, as to how the tribunals of Federal Governments should deal with enactments made by the divers Legislatures beyond the limits of the legislative powers assigned to them respectively, by the Charters or Constitutions to which they owe their existence. I do not hesitate to say that the duty of the Courts is to disregard, or refuse obedience to, all such enactments, as null and void.

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In support of this position, I quote, in the first place, the opinions of some great publicists and jurists who have defined the duties of judges, in relation to the conflicting laws of Federal, or Composite Governments, organized by social compact between Independent States.

Austin, one of the most profound of all writers in the English language on the philosophy of Law and Jurisprudence, says:—

"To illustrate the nature of a composite state, I will add the following remark to the foregoing general description: Neither the immediate tribunals of the common or general government, nor the immediate tribunals of the several united governments are bound, or empowered, to administer or execute every command that it may issue. The political powers of the common or general government are merely those portions of their several sovereignties which the several united governments, as parties to the Federal compact, have relinquished and conferred upon it. Consequently, its competence to make laws and to issue other commands, may and ought to be examined by its own immediate tribunals, and also by the immediate tribunals of the several united governments; and if, in making a law or issuing a particular command, it exceed the limited powers which it derives from the Federal compact, all those various tribunals are empowered and bound to disobey.

"And since each of the united governments, as a party to a Federal compact, has relinquished a portion of its sovereignty, neither the immediate tribunals of the common or general government, nor the immediate tribunals of the other united governments, nor even the tribunals which itself immediately appoints, are bound, or empowered, to administer or execute every command that it may issue. Since each of the united governments, as a party to the Federal compact, has relinquished a portion of its sovereignty, its competence to make laws and to issue other commands may and ought to be examined by all those various tribunals. And if it enact a law or issue a particular command, as exercising the sovereign powers which it has relinquished by the compact, all those

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various tribunals are empowered and bound to disobey. . . . .  
For every political power conferred on the general government is subtracted from the several sovereignties of the several united governments. From the sovereignty of that aggregate body, we may deduce, as a necessary consequence, the fact that I have mentioned above: namely, that the competence of the general government, and of any of the united governments, may and ought to be examined by the immediate tribunals of the former, and also by the immediate tribunals of any of the latter. For since the general government, and also the united governments, are subject to that aggregate body, the respective Courts of Justice which they respectively appoint, ultimately derive their powers from that sovereign and ultimate Legislature. Consequently those Courts are ministers and trustees of that sovereign and ultimate Legislature, as well as of the subject Legislatures by which they are immediately appointed; and consequently those Courts are empowered, and are even bound to disobey, wherever those subject Legislatures exceed the limited powers which that sovereign and ultimate Legislature has granted or left them." [Vol. II., p. 261.]

Alexander Hamilton—one of the most eminent statesmen and publicists this Continent has produced—in No. 78 of the "Federalist," wrote: "There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative Act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers authorize, but what they forbid."

In the case of *Marbury v. Madison*, (1) Marshall, C. J. of the Supreme Court of the United States, made use of the following expressions in giving judgment: "The original and supreme will organizes the government and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments."

"The Government of the United States is of the latter description. The powers of the Legislature are defined and limited, and that those limits may not be mistaken or forgotten, the Constitution

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(1) 1 Cranch, 137.

is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a Government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. *It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the Legislature may alter the Constitution by an ordinary act.*

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"Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means; or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

"Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an Act of the Legislature repugnant to the Constitution is void.

"This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject."

Having established the supremacy of the Constitution, and the nullity of all legislative acts passed in contravention of its principles, Marshall, C.J., thus continued his judgment:

"If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret the rule. If two

L'UNION St. laws conflict with each other, the Courts must decide on the operation of each.  
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 Q. B., Quebec. law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law disregarding the Constitution; or conformably to the Constitution disregarding the law; the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If then the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

"Those then who controvert the principle that the Constitution is to be considered in Court as a paramount law, are reduced to the necessity of maintaining that Courts must close their eyes on the Constitution and see only the law.

"*This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which according to the principles and theory of our government is entirely void, is yet in practice completely obligatory. It would declare that if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.*"

These incontrovertible propositions, admitted as undoubted by Kent, Sedgwick, by—in one word—all the great legal writers of the neighbouring Republic,—seem to acquire, if possible, more force when applied to exorbitant Acts which English Colonial Legislatures assume to pass in defiance of the restricted charters granted to them, not by mutual concessions, but by the behest of the Imperial Parliament,—the source of all power,—executive, legislative and judicial, within the realm. And that sovereign power, in its supremacy, has said to each of the Legislatures of this Dominion :—"Thus far shalt thou go, and no farther."

On the few occasions when the judges of the Dominion have been called upon to decide this question, they have been unanimous, with one exception. I therefore, in the second place, refer to the opinions pronounced by them in similar cases.

In New Brunswick, in the case of *The Queen v. Chandler*, in re

*Haileton*, (1) the Supreme Court rendered judgment on June 11th, 1869, maintaining its right, and consequently that of all courts throughout the Dominion, to disregard the provisions of an Act of a Local Legislature passed in violation of the B. N. A. Act, 1867. In that case, Ritchie, C. J., in giving the apparently unanimous judgment of the Court, made use of the following expressions:—"The B. N. A. Act entirely changed the Legislative Constitution of the Province. The Imperial Parliament has intervened, and by virtue of its supreme legislative power, has taken from the subordinate legislative body of the Province the plenary power to make laws, which it formerly possessed, by depriving it of the right to legislate on all matters coming within certain enumerated classes of subjects, and has within the Dominion of Canada delegated the sole right to deal with such matters to the exclusive legislative authority of the Parliament of Canada. Insolvency being one of these subjects, and the local Act the validity of which is now questioned, treating of matters in our opinion directly within that subject, the Act in question being an Insolvent Act in the strictest sense of the term, there arises an undoubted conflict between the Statute of the Imperial Parliament and such Act of the Local Legislature, and presents the case suggested by Mr. Justice Parker, *where we are bound to pronounce our opinion on the validity of the local Act.*

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"The Imperial Statute says that the Parliament of Canada shall exclusively legislate on Bankruptcy and Insolvency; in other words, that the inhabitants of the Dominion shall be bound only by laws passed after the 1st July, 1867, within the Dominion, on these subjects by the Parliament of Canada. The subordinate legislative body of the Province, *in defiance* of this Statute, has undertaken to legislate on this subject, and by so doing seek to bind the inhabitants of this portion of the Dominion by their Act. Their right to do so is now contested, and under these circumstances can there be any doubt as to what we are bound to do? We think not. We must recognize the undoubted legislative control of the British Parliament, and give full force and effect to the Statute of the Supreme Legislature, *and ignore the Acts of the subordinate, when, as in this case, they are repugnant and in conflict.* . . . . The Constitution of the Dominion and Province is now to a great extent a written one, and where, under the terms of the Union Act, the

L'UNION ST. power to legislate is granted to be exercised exclusively by one  
 JACQUES body, the subject so exclusively assigned is as completely taken  
 v. from the others as if they had been expressly forbidden to act in it;  
 BELISLE. and if they do legislate beyond their powers, or in defiance of the  
 Q. B., Quebec. restrictions placed on them, *their enactments are no more binding*  
 Drummond, J. *than rules and regulations promulgated by any other unauthorized body.*  
 The fact of this Act having been confirmed by the Governor-General was much relied on as giving it a binding force and effect, but we fail to see how this can be. No power is given to the Governor-General to extend the authority of the Local Legislature, or enable it to override the Imperial Statute, which would be the necessary results if the Local Legislatures could, by assuming their right to legislate on a prohibited subject, have their action legalised and validity given to their acts by the simple confirmation of the Governor-General, thus making the individual act of the Local Legislature or of the Governor-General, or their united acts, superior to the Parliament of Great Britain."

My judgment in *Ex parte Papin* (1) for writ of *habeas corpus*, I find substantially well reported in these words: "The enactments of the B. N. A. Act, 1867, 30 and 31 Vict., c. 3, s. 92, sub-sec. 15, are as follows: 'The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.' Therefore the punishment imposed by Local Legislatures on an offence cannot be cumulative; it must be either fine, penalty, or imprisonment; it cannot be fine and imprisonment. This provision therefore limits the whole of the powers of imposing punishment by Provincial Legislatures, and they cannot grant to Corporations any greater powers of punishment than they possess themselves, so that the 32 Vict., c. 70, s. 17, is clearly *unconstitutional*, in so far as it assumes to authorize the imposition of punishment by fine and imprisonment for an infraction of a by-law of the City of Montreal. This sect. 17 of the 32 Vict., c. 70, being the clause relied on to maintain the commitment and conviction in this matter, Papin having been condemned to pay \$20 and to be imprisoned for two months, it is clear that both conviction and commitment are null and void. The petitioner must therefore be discharged."

Mr. Assistant Justice Ramsay, whilst holding the Court of

Queen's Bench, Crown side, at Sherbrooke, in the case of *Pope and Griffith* (1), said, in giving judgment dismissing the appeal: "The grounds of the appeal are substantially that the conviction is not supported by the evidence, and that the Act, in so far as it prescribes any criminal procedure, is beyond the powers of the Legislature of the Province of Quebec.

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"With regard to the second of these questions, I have no doubt that it is competent for this Court, or indeed for any Court in this Province, incidentally to determine whether any Act passed by the Legislature of the Province be an act in excess of its powers. This is a necessary incident of the partition of the legislative power under the B. N. A. Act, without reserving to any special Court the jurisdiction to decide as to the constitutionality of an Act of any of the Legislatures."

I wish it to be clearly understood that, however repugnant to morality the Act under consideration may be, as annulling private contracts, and violating acquired rights, this Court did not require to be taught, by a wasted display of legal lore, that judges have no power to set aside, arrest, or nullify a law passed in relation to a subject *within the scope of legislative authority*, on the ground that it conflicts with their ideas of natural right, abstract justice, morality or honour.

The question under consideration is not the moral character of the Act, but the power—the authority of the framer.

The decision of this Court does not tend to impair the supremacy of the Imperial Parliament, but to maintain it in its full power.

Undoubtedly the relative position of the several Legislatures in this Dominion and the judiciary at the present moment is unsatisfactory.

But the remedy for the evil is obvious and of facile application.

If we wish this Dominion Government to become successful and prosperous, we must organize a special tribunal. Let it be called by any name except a "Court of Appeal." We have already too many of that class. Give it exclusive power to decide all constitutional questions, and invest it also with exclusive jurisdiction to deal with all litigious difficulties arising between the Federal and Local Governments.

Whenever, in any case, the constitutionality of a law is called in question, let it be immediately evoked to the Supreme Tribunal,



L'UNION ST. under such checks as would be necessary to prevent abuse, and  
 JACQUES thus you will avoid the *inconvenience* of allowing every judge, from  
 v. the Chief Justice of this Court to the Justice of the Peace, or the  
 BELISLE Commissioner of small causes, to refuse obedience to a law solemnly  
 Q. B., Quebec. passed by a legislative body, as he is now bound to do, whenever  
 Drummond, J. he believes that it is opposed to the behest of the Imperial Parlia-  
 ment. The state of things now existing might be termed *Legisla-*  
 tive and Judicial Anarchy. A change must be made.

No Federal Government can long maintain its existence without a Court such as the tribunal suggested.

The Government of the United States might have fallen into dissolution ere now, had it not been saved by the Supreme Court, which is, perhaps, the greatest despotism in the world ; but it is the beneficent despotism of the law.

The Imperial Parliament, however, is alone vested with the power of passing a law such as that, the enactment of which I venture to advise.\*

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\*[The Supreme Court of Canada was afterwards established by the Parliament of Canada, 38 Vict. cap. 11.]

## [PRIVY COUNCIL.]

JAMES DOW AND OTHERS.....*Appellants,*

J. C.\*

AND

1875

March 5.

WILLIAM T. BLACK AND OTHERS.....*Respondents.**On appeal from the Supreme Court of New Brunswick.*[*Reported L. R. 6 P. C. 272.*]*Distribution of Legislative Power—Legislature of New Brunswick.*

An Act of the Provincial Legislature of New Brunswick (33 Vict. c. 47) intituled "An Act to authorize the issuing of Debentures on the credit of the lower District of the Parish of St. Stephen, in the County of Charlotte," which empowered the majority of the inhabitants of that Parish to raise, by local taxation, a subsidy designed to promote the construction of a railway extending beyond the limits of the Province, but already authorized by statute, was held to be within the legislative capacity of that Legislature.

A Provincial Legislature may, under the B. N. A. Act, sec. 92, art. 2, impose direct taxation for a local purpose upon a particular locality within the Province.

The Act in question was held to relate to "a matter of a merely local or private nature in the Province," which, by the 92nd section of the B. N. A. Act, is assigned to the exclusive competency of the Provincial Legislature, and not to relate to a railway or any local work or undertaking within the excepted subjects mentioned in Art. 10, sub-sect. (a) of the said section.

L'UNION ST. JACQUES DE MONTREAL V. DAME JULIE BELISLE (L. R. 6 P. C. 31, *ante* p. 57) approved.

The question decided in this appeal was whether the Act of the Provincial Legislature of New Brunswick (33

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\* Present :—Sir James W. Colville, The Lord Justice James, The Lord Justice Mellish, and Sir Montague E. Smith.

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Vict., c. 47) is within the powers of that Legislature according to the true construction of the Imperial Statute, the B. N. A. Act, 1867.

The Act in question intituled "An Act to authorize the issuing of debentures on the credit of the lower District of the Parish of St. Stephen," is, so far as is material for the present question, in the following terms:—

"Whereas the inhabitants of the town of St. Stephen, in the county of Charlotte, are desirous of having direct railway connection between Houlton, in the State of Maine, and the St. Croix Valley, in the county aforesaid; and whereas the town of Houlton has offered the Houlton Branch Railway Company a bonus of \$30,000, upon condition that the said Houlton Branch Railway Company shall and do construct, and suitably equip with necessary rolling stock a railway from the town of Houlton aforesaid to the line of the New Brunswick and Canada Railway and Land Company, at or near the Debec Station so called, and so that the said railway shall be completed and ready for the conveyance of passengers and freight on or before the 1st day of January in the year of our Lord 1872; and whereas the said Houlton Branch Railway Company are willing to undertake the building and construction of such connecting line of railway, and have the same completed and properly equipped for the conveyance of freight and passengers as aforesaid, within the time aforesaid, upon the conditions that the town of St. Stephen do and shall give to the said Houlton Branch Railway Company a bonus of \$15,000; and whereas the inhabitants of that portion of the said town of St. Stephen called the lower District, and hereinafter particularly described, are willing and desirous to give the said sum for the said purpose, and that the said sum should be raised upon

the credit of the real and personal property of the inhabitants of the said lower District in such mode and manner as may be thought most advisable.

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“Be it therefore enacted by the Lieutenant-Governor, Legislative Council, and Assembly as follows:—

“1. That upon the said Houlton Branch Railway Company giving reasonable and proper security to the Justices of the Peace in general sessions or special sessions called for that purpose, that the said line of railway from Houlton to the line of the said New Brunswick and Canada Railway and Land Company shall be built and efficiently furnished and completed, and substantially ready and fit for the conveyance of freight and passengers and properly provided with all necessary locomotive engines, cars, and carriages, within the time aforesaid limited for so doing; such reasonable and proper security to be by bond under the hand and seal of not less than three responsible persons, resident and having property in this Province, under the penalty of \$40,000 conditioned as herein above stated, which said bond the said Justices are hereby authorized to take and enforce by suit at law for breach thereof, if such shall occur; no person shall be accepted as such security until he shall have first made affidavit before some Justice of the Peace in the county of Charlotte, who is hereby authorized to administer such oath, to be filed in the office of the Clerk of the Peace for said county, that the value of his property in this Province, over and above all his just debts and liabilities, is not less than \$20,000; the said Justices in general or special sessions shall forthwith issue and deliver, or cause to be issued and delivered, as a bonus to the said Houlton Branch Railway Company, certificates of debt, to be called debentures, to the amount of \$15,000 in current money of the Province of New Brunswick, of such denomination or denominations

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as they may see fit, to be numbered consecutively according to the denomination thereof, from number one upwards, of each denomination, with coupons annexed, bearing interest at 6 per centum per annum, payable semi-annually, at such place as shall be therein specified, and on such conditions and terms as shall be prescribed by the said Justices in general or special sessions; the principal money of such debentures to be paid in full at the expiration of twenty years from the date thereof to the holders of the same, at such place and in such manner as shall be prescribed in the same.

"2. The real and personal property of all persons, resident or non-resident, situate in the lower district of St. Stephen's, so-called, described as follows [then follow the boundaries]: 'Shall each and every year, during the continuance of the term of the said debentures, be assessed for the payment of the interest on such debentures, issued under the authority of this Act, an order for which assessment shall be made by the said Justices in general or special sessions each and every year as aforesaid, and levied and collected in the same manner in all respects as parish and county rates are now or may be hereafter assessed, levied and collected, and when collected shall be paid into the St. Stephen's Bank, in the county of Charlotte, or such other place as may at first or at any subsequent period be selected by the said Justices by order of the Justices in general or special sessions to the collector of same for the purpose of paying the coupons on said debentures, which coupons shall be paid by the cashier of the said bank or other person selected as aforesaid, to the holders of such coupons, upon presentation thereof out of the funds so deposited.'"

Sect. 3 of the Act provides for a similar assessment by order of the Justices in general sessions, for the

repayment of the principal sums due on the debentures within twenty years, but at such times and in such mode as the Justices shall determine.

Sect. 4 provides for the form of the debentures.

Sect. 5 provides for the summoning by two Justices of a meeting of the ratepayers of the said lower district of the Parish of St. Stephen, and enacts that the Act shall not come into force unless it is approved at such meeting by two-thirds of the ratepayers, but that if it is so approved the Justices shall certify the same to the Governor in Council, and the Governor shall thereupon announce the same by proclamation in the *Royal Gazette* of the Province, and that thereupon the Act shall be *ipso facto* in full operation, force and effect.

A meeting of the ratepayers of the said lower district of St. Stephen was held on the 11th of August, 1870, and the requisite majority of votes in favour of the Act was obtained and the debentures issued.

On the 14th of April, 1871, the Justices of the Peace at the general sessions for the county of Charlotte issued a warrant to the appellants, the assessors of the parish of St. Stephen, commanding them to levy and assess \$958.50 on the lower district of St. Stephen, to pay the interest on the said debentures.

The appellants accordingly assessed the ratepayers of the district, and amongst others the Respondents, and the collector of rates applied to the Respondents for payment, which they refused.

The Respondents thereupon applied for and obtained a writ of *certiorari* to remove into the Supreme Court the said warrant of assessment, and the assessment and all notices and documents upon which they were founded.

A return, and subsequently an amended return, having been made, the Respondents applied for and obtained a rule *nisi* to quash the said warrant and assessment on

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the ground that the Act 38 Vict. c. 47, related to a railway extending beyond the limits of the Province, and was therefore not within the competence of the Provincial Legislature of New Brunswick.

On the 22nd of February, 1873, the Supreme Court\* (Ritchie, C. J., Allen and Weldon, JJ.) gave judgment, making the rule absolute to quash the said warrant and assessment on the ground stated in the rule. Fisher, J., dissented on the grounds, first, that the Imperial Act, sect. 92, sub-sect. 10, paragraph (a), related only to railways between two provinces, and not to railways from a province into a foreign country; secondly, that the Court might presume that the money raised by debentures would be applied to the making of the part of the railway within the province, and that an Act to raise money for that purpose was within the competency of the Provincial Legislature.

Mr. Benjamin, Q.C., and Mr. W. Grantham, for the Appellants.

Mr. Fry, Q.C., and Mr. Bompas, for the Respondents.

The judgment of their Lordships was delivered by  
SIR JAMES W. COLVILLE :—

This is an appeal against an order of the Supreme Court of the Province of New Brunswick, making absolute a rule *nisi* that had been granted, and ordering that "the assessment made upon the lower district of the Parish of St. Stephen, in the County of Charlotte, under and by virtue of a warrant of assessment issued to the assessors of the Parish of St. Stephen by the General Sessions of the Peace in and for the County of Charlotte on the 14th day of April, 1871, directing the said

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\* *Post*, p. 108.

assessors to assess upon the lower district of St. Stephen the sum of \$958.50 for payment of interest upon debentures issued under the Act of Assembly, 33-Vict. c. 47, intituled "An Act to authorise the issuing of debentures on the credit of the lower district of the Parish of St. Stephen, in the County of Charlotte, and the said warrant and all proceedings upon which the said assessment is based be absolutely quashed."

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The ground upon which the majority of the judges constituting the Court proceeded, was that the Act of Assembly mentioned in the order was itself null and void, inasmuch as it had been passed by the Provincial Legislature of New Brunswick, which, on the true construction of the Imperial Statute, the B. N. A. Act, 1867, had no power to make such a law.

It is necessary, in order to deal with the arguments which have been addressed to their Lordships upon this appeal, to consider shortly under what circumstances this question arose. On the 10th of June, 1867, and before the Imperial Statute just mentioned came into operation, the then Legislature of New Brunswick passed an Act, by the 6th section of which it was provided, "that the sum of \$5,000 per mile, and not exceeding in the whole \$17,500, should be granted for the construction of a branch line of railway to the boundary line of the State of Maine, from the railway leading from St. Andrews to Woodstock, to such person or persons or body corporate as shall construct the said road, upon its being proved to the satisfaction of the Governor in Council that a good and sufficient railway is constructed therein within four years from the passing of this Act, and in good working order for travel and traffic." That Act was followed by another passed a few days afterwards, viz., on the 17th June, by which certain persons were made and constituted a body corporate under the



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name of the Houlton Branch Railway Company, and were authorised to make and construct a railway running from the intersection of the Woodstock line of railway with the New Brunswick and Canada Railway, being a place known as Debec, to the boundary line of the State of Maine and the Province of New Brunswick. The 5th section of that Act contains the following provisions :—

“ The president, directors, and company for the time being are hereby authorised and empowered, by themselves or their agents, to exercise all the powers herein granted to the corporation for the purpose of locating and completing said railroads and branches, and for the transportation of persons, goods, and property of all descriptions; and all such power and authority for the management of the said corporation as may be necessary and proper to carry into effect the objects of this Act, to purchase or hold within or without the province lands, materials, engines, cars, and other necessary things, in the name of the corporation, for the use of the said road, and for the transportation of persons, goods, and property of all descriptions, and to make such connection with other railway companies within or without the province, either by leasing their road to other corporation or corporations, on such terms and for such length of time as may be agreed upon, or by consolidating the stock of their road with that of other railway companies or companies, upon such terms as may be agreed upon;” and gives other powers to the new company.

Hence, on the 7th July, 1867, when the B. N. A. Act, 1867, came into operation, the Houlton Branch Railway Company had been duly incorporated, and by the Act of a competent Legislature had been duly authorised to construct a railway from Debec to the frontier that

divides the province from the State of Maine. Some years afterwards the Act, the validity of which is now called in question, being the 38 Vict. c. 47, was passed.

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Its preamble recites that the town of Houlton, which is in the State of Maine, had offered the Houlton Branch Railway Company a bonus of \$30,000, upon condition that the said Houlton Branch Railway Company should construct and suitably equip with necessary rolling stock a railway from the town of Houlton aforesaid to the line of the New Brunswick and Canada Railway and Land Company, at or near the Debec station, before the 1st of January, 1872; that the Houlton Branch Railway Company were willing to undertake the building and construction of such connecting line of railway, etc., and to have the same completed and properly equipped for the conveyance of freight and passengers as aforesaid within the time aforesaid, upon condition that the town of St. Stephen,—that being a town in the province of New Brunswick,—should give to the said Houlton Branch Railway Company a bonus of \$15,000; and that the inhabitants of that portion of the said town of St. Stephen called the lower district, which was afterwards described, were willing and desirous to give the said sum for the said purpose, and that such sum should be raised upon the credit of the real and personal property of the inhabitants of the said district in such manner as might be thought most advisable. It clearly appears from these recitals that there was a desire both on the part of the inhabitants of Houlton in the State of Maine and the inhabitants of that portion of St. Stephen in the Province of New Brunswick, or some of them, that this line of communication between the two places should be completed; that its completion was considered to be for the benefit of both communities; and that a portion,

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at all events, of the inhabitants of that district of St. Stephen, in order to effect the arrangement, were willing to be taxed for the purpose of raising the bonus of \$15,000 required by the Houlton Branch Railway Company. Accordingly the Act of Assembly provided for the carrying out of the arrangement in this way: It required the Houlton Branch Railway Company to give reasonable and proper security to the Justices of the peace at general or special sessions for the completion of the work; and provided that thereupon the \$15,000 should be raised by the issue of debentures to that amount payable twenty years after date, and carrying interest in the meantime. It further provided that the real and personal property of all persons resident in the lower district of St. Stephen, as defined by the Act, should be assessed in order to raise the interest on such debentures, and the principal when the latter should become due. But it also provided that the Act should not be in force until it had been accepted and approved by two-thirds at least of the ratepayers liable to be assessed thereunder, whose assent was to be obtained by the machinery thereby provided, and, when ascertained, was to be certified to the Governor in Council,—that is, the Governor-General in Council of Canada,—who was to announce the same by proclamation in the *Royal Gazette*. The Act in question was never disallowed by the Governor-General of Canada; all the formalities prescribed by it appear to have been complied with, and the assent of the requisite proportion of ratepayers to have been duly notified in the *Gazette*.

In this state of things it is to be presumed that the minority of the ratepayers which dissented from the arrangement was unwilling to pay the rate assessed upon them in order to meet the interest on the debentures, and raised this question before the Supreme Court.

That Court issued a *certiorari* to remove the proceedings, and, upon the return of the *certiorari*, made the order *nisi*, which the order under appeal has made absolute.

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The grounds upon which the Supreme Court has pronounced this Act to be *ultra vires* of the Local Legislature are entirely derived from sub-sect. (a) of the 10th article of sect. 92 of the Imperial Statute. Sects. 91 and 92 purport to make a distribution of legislative powers between the Parliament of Canada and the Provincial Legislatures, sect. 91 giving a general power of legislation to the Parliament of Canada, subject only to the exception of such matters as by sect. 92 were made the subjects upon which the Provincial Legislatures were exclusively to legislate. The 10th article of sect. 92 among those subjects enumerates local works and undertakings other than such as are of the following classes. Then follow the exceptions, and the first of these is, lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province. A question touching the construction of this sub-section has been raised both here and in the Court below. The Respondents insist that the lines of railways which are thereby put within the exclusive jurisdiction of the Parliament of Canada are all railways which extend either beyond the limits of the province into other provinces within the Dominion or into foreign countries. On the other hand, the Appellants contend that a more limited construction is to prevail, and that if the sub-section be taken in connection with the following sub-sect. (b), it will be found to apply only to railways extending beyond the limits of one province into another province of the Dominion.

Their Lordships do not think it necessary to deter-

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mine upon the present appeal this question of construction, or to affirm that if all the legislation that has taken place, including that for the incorporation of the Houlton Railway Company, and empowering it to make a railway to the frontier or beyond it, had taken place after the Imperial Statute of 1867 had come into operation, such legislation would have been within the powers of the Provincial Legislature. They do not think it necessary to determine that question, because they are of opinion that the validity of the Act of Assembly, the 33 Vict. c. 47, does not depend upon the sub-section in question. They are of opinion that the Act cannot be said to be a law in relation to a local work or undertaking within the fair and reasonable meaning of these words. The incorporation of the company, with its powers, and the construction of the railway up to the frontier, and therefore so far as any legislative power within the British Dominions could determine that construction, had been already authorised by the Acts passed before the Imperial Statute came into operation. The Act now in question did not purport to enlarge the powers of the railway company, nor could it give them powers to be exercised on the foreign soil of Maine. Their Lordships consider that if the railway company had chosen to make an arrangement with the inhabitants of Houlton, in the State of Maine, for the construction of the railway on the terms of the bonus of \$30,000 which had been offered to them from Houlton, there would have been no legal objection to their carrying out that arrangement. The Act was merely one which enabled the majority of the inhabitants of the parish of St. Stephen to raise by local taxation a subsidy designed to promote a work which they considered to be for the benefit of their town, and to place the inhabitants in a position to bargain and to act for

their common benefit in the same manner as a private person might have thought it for his benefit to do. In substance and principle it does not differ from a private Act authorising the trustees or guardians of a minor to let a warehouse to such a company. Supposing the work, instead of being a railway, had been a canal, and the inhabitants had been authorised to make a bargain for the supply of water to the district, could any doubt have been entertained on the subject? Their Lordships are therefore of opinion that no objection to the validity of the Act is to be found in the sub-section in question.

Another question has been raised for the first time at this Bar (for the objection does not appear to have been taken in the colonial Court), whether there was power in the Provincial Legislature to pass an Act by which such an assessment as this could be imposed on the town of St. Stephen.

It has been argued that whereas the 91st section reserves to the Parliament of Canada exclusive power of legislation in respect of, amongst other subjects, "The raising of money by any mode or system of taxation," the only qualifications imposed on that general reservation are to be found in the 2nd and 9th articles of the 92nd section. The latter has obviously no bearing on the present question. As to the former, it was contended that it authorises direct taxation only for the purpose of raising a revenue for general provincial purposes, that is, taxation incident on the whole province for the general purposes of the whole province.

Their Lordships see no ground for giving so limited a construction to this clause of the Statute. They think it must be taken to enable the Provincial Legislature, whenever it shall see fit, to impose direct taxation for a local purpose upon a particular locality within the province. They conceive that the 3rd article of sect. 91

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is to be reconciled with the 2nd article of sect. 92, by treating the former as empowering the Supreme Legislature to raise revenue by any mode of taxation, whether direct or indirect; and the latter as confining the provincial legislature to direct taxation within the province for provincial purposes. Their Lordships are further of opinion, with Mr. Justice Fisher, the dissentient Judge in the Supreme Court, that the Act in question, even if it did not fall within the 2nd article, would clearly be a law relating to a matter of a merely local or private nature within the meaning of the 9th article of sect. 92 of the Imperial Statute; and therefore one which the Provincial Legislature was competent to pass, unless its subject matter could be distinctly shewn to fall within one or other of the classes of subjects specially enumerated in the 91st section. This view is in accordance with the ruling of this tribunal in the recent case of *L'Union St. Jacques de Montreal v. Dame Julie Belisle* (*ante*, p. 68) decided on the 8th of July, 1874.

On these grounds their Lordships will humbly advise Her Majesty that the order under appeal be reversed, and that in lieu thereof an order be made discharging the rule *nisi*, which had been granted in Trinity Term, with costs. The Appellants will also have their costs of this appeal.

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JUDGMENTS IN THE SUPREME COURT OF NEW BRUNSWICK.

[*Reported 1, Pugsley 300.*]

The judgment of the majority of the Court (Ritchie, C. J., Allen and Weldon, JJ.,) was delivered by

ALLEN, J. :—

We granted a *certiorari* to bring up an assessment in course of collection on the ratepayers within a certain district of the Pariah of St. Stephen. That assessment having been returned, we are now asked to quash it on the same grounds on which we

granted the rule for the *certiorari*. As we have not altered our opinion on the subject, it will be sufficient to state substantially what we said when granting the *certiorari*. The Act, under the authority of which this assessment was made, is the 33 Vict. cap. 47, intituled "An Act to authorize the issuing of debentures on the credit of the Lower District of the Parish of St. Stephen's, in the County of Charlotte." This Act recites, that "the inhabitants of the Town of St. Stephen's, in the County of Charlotte, are desirous of having direct railway connection between Houlton, in the State of Maine, and the St. Croix Railway in the county aforesaid;" that the town of Houlton had offered the Houlton Branch Railway Company a bonus of thirty thousand dollars, upon condition that the said Company should construct, and suitably equip with rolling stock a railway from the town of Houlton aforesaid, to the line of the New Brunswick and Canada Railway and Land Company, at or near the Debec Station (so called), so that such railway should be completed and ready for the conveyance of passengers and freight on or before 1st of January, 1872. That the said Houlton Branch Railway Company were willing to undertake the building and construction of such connecting line of railway, etc., upon the condition that the town of St. Stephen did and should give to the Houlton Branch Railway Company a bonus of fifteen thousand dollars;" and that the inhabitants of that portion of the said town of St. Stephen, called the Lower District, and therein-after particularly described, were willing and desirous to give said sum, and that such sum should be raised upon the credit of the real and personal property of the inhabitants of the said district, in such manner as might be thought most advisable. It then enacts in section 1, that upon the said Houlton Branch Railway Company "giving reasonable and proper security to the Justices of the Peace in general sessions, or special sessions called for that purpose, that the said line of railway from Houlton to the line of the said New Brunswick and Canada Railway and Land Company, should be built and efficiently furnished and completed, and substantially ready and fit for the conveyance of freight and passengers, and properly provided with all necessary locomotive engines, cars and carriages within the time aforesaid, limited for so doing, etc., etc.;" the said Justices in general or special Sessions should forthwith issue and deliver, or cause to be issued and delivered, as a bonus to the said Houlton Branch Railway Company, certificates of debt, to be called debentures, to the amount of fifteen thousand

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dollars of current money of New Brunswick, of such denomination as they may see fit, etc., with coupons annexed, bearing interest at six per cent. per annum, the principal money of said debentures to be paid in full at the expiration of twenty years from the date thereof.

Section 2 enacts, that the real and personal property of all persons, resident or non-resident, situated in the Lower District of St. Stephen, so called, within certain bounds (which are particularly described), "shall, each and every year during the continuance of the term of the said debentures, be assessed for the payment of the interest on such debentures issued under the authority of this Act ; an order for which assessment shall be made by the said Justices in general or special sessions, each and every year as aforesaid, and levied and collected in the same manner in all respects as parish and county rates are now, or may be hereafter assessed, levied and collected," etc.

Section 3 enacts, that "the principal money payable on the debentures aforesaid shall be raised by assessment in the ordinary way in which county and parish rates are assessed, levied and collected on the real and personal property of residents and non-residents situated in the lower district aforesaid, subject to be assessed ; which assessment, levy and collection, the said Justices, in general and special sessions called for that purpose, are hereby required and authorised to order to be done, and within the period of twenty years from the issuing of the debentures aforesaid ; and such assessment, levy and collection may be ordered to be made at such time or times, and for such amount or several amounts as by the said Justices shall be deemed advisable for the payment and redemption in full of the debentures aforesaid, or any portion or number thereof, so that the same shall be fully redeemed and paid within the period of twenty years from the issue thereof ; and the moneys so assessed, levied and collected, shall be subject to the order of the said Justices in general or special sessions, as to its place of deposit or appropriation, or otherwise, according to the purposes of this Act, for the redemption and payment of the said debentures."

It was contended that this Act was *ultra vires* of the Local Legislature, and therefore void ; that under the B. N. A. Act, 1867, section 92, sub-section 10, paragraph (a), it was withdrawn from the class of subjects on which the Provincial Legislature might legislate ; and that by force of section 91, which declares the

matters over which the Parliament of Canada should have exclusive legislative authority, it belonged exclusively to that Parliament.

Under section 92, which enumerates the matters confided to the Local Legislature, we have by sub-section 10, "local works and undertakings, other than such as are of the following classes." Then follow three paragraphs, (a), (b), and (c), of excepted classes. Paragraph (a) is the only one that bears on the subject before us, and it reads thus:—"Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Provinces."

Under section 91, which specifies the classes of subjects assigned exclusively to the Parliament of Canada, by sub-section 29, we have "such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

It was contended that the subject matter of the 33 Vict. cap. 47, came within one of such exceptions, and was, therefore, beyond the power of the Provincial Assembly.

In the case of *Regina v. Chandler*, (1) this Court very clearly enunciated the principles by which it should be governed, in determining cases where local legislation was attempted on matters expressly withdrawn from the Provincial Legislatures, and vested exclusively in the Parliament of Canada; and in the case of *The European and North American Railway Company v. Thomas* (2), decided a short time since, we examined those portions of the 91st and 92nd sections of the B. N. A. Act, 1867, by which the question now under discussion must be determined. In that case we decided, that where the railway, the immediate subject of legislation, was to be constructed clearly within the limits of the Province, and not connecting the Province with any other or others of the Provinces, and no power was attempted to be given to extend beyond, into the United States of America, it was properly the subject of legislation by the Provincial Assembly.

We are now called on to say whether the matters legislated upon by the 33 Vict., cap. 47, are subject to the same legislative control, or are *ultra vires* of the Local Legislature.

It is a clear, and well-established rule of construction, that where the words of an Act of Parliament are plain and unambiguous, and

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(1) Hannay, 548.

(2) 1 Pugsley, 42.

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without anything in the Act to limit or control them, Courts are bound to construe them in their plain and ordinary sense. In such a case, we can look to nothing but the language of the Act, giving the words of the Statute their ordinary meaning, to carry out what the Legislature in words enacts.

We have cited enough of the Act to shew the subject matter legislated upon, and the general intention of the Legislature relating thereto. The other provisions relate only to the Act not coming into operation without the vote and assent of two-thirds of the ratepayers of the district, and to the means by which the object contemplated is to be effected.

In *The European and North American Railway Company v. Thomas*, we shewed that the right to legislate relative, *inter alia*, to railways and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province, belonged, by the express terms of the B. N. A. Act, 1867, exclusively to the Parliament of Canada. If that be so, how can this Act 33 Vict. c. 47, be valid? The railway, with a view to the construction of which the Act was passed, most unquestionably extends beyond the limits of this Province. It is a connecting line of railway from the town of Houlton, in the United States of America, to the line of the New Brunswick and Canada Railway and Land Company (a railway constructed within this Province by virtue of divers Acts of the Provincial Assembly), at or near Debec Station, so called, in this Province; for the purpose, as the Act declares, of meeting the desires of the inhabitants of the town of St. Stephen in the county of Charlotte, and to enable them to have (as stated in the Act) direct railway communication between Houlton in the State of Maine, in the United States of America, and the St. Croix Valley in the county of Charlotte, in this Province. How then can any one who reads the Act escape the conclusion that it directly contravenes the letter and spirit of the B. N. A. Act, 1867, in this:—that it deals with, and makes provision for, the construction and completion of a railway unquestionably extending beyond the limits of the Province?—a subject matter expressly and unequivocally reserved to be dealt with exclusively by the legislative power of the Parliament of Canada.

It is difficult to conceive how, if the Local Legislature had the power, it could more efficaciously legislate on the subject of railways extending beyond the limits of the Province, or secure the existence or completion of such undertakings than by providing the

funds necessary for their construction, and that, too, in a case like this, where, from the Act, it would seem that the giving of the debentures to be issued thereunder was an express condition on which the road was to be built, and without which, the fair inference is, the road could not or would not be built.

Many cogent reasons were suggested during the argument why the Imperial Parliament, not only in the interest of the Dominion with reference to fiscal and trade regulations, but also in the interest of the Dominion and the Empire at large in a strategic point of view in reference to the protection and defence of this portion of the Empire, confided to the Parliament of Canada and the General Government of the Dominion the exclusive right to legislate on the excepted classes of subjects having reference to matters connected with the establishment of great lines of communication extending out of and beyond the limits of the respective Provinces. But it is unnecessary for us to speculate on what may have influenced the Parliament, or to discuss the policy of the Act. It is sufficient that the language of the Act is, in our opinion, clear and unambiguous; and in such a case, its provision must be respected and obeyed alike by all.

We do not disguise from ourselves that the Provincial Act having been accepted as binding, and having been acted upon, much disappointment, and very serious inconvenience and loss may, nay, almost necessarily must, result from the effect of our decision. While we regret that this should be the case, we dare not shrink from the discharge of our duty, which in this, as in every other case that comes before us, is plain, simple and imperative, that is, to declare the law as we honestly believe it to be, wholly regardless of consequences.

The Local Legislature then having in our opinion exceeded its authority, the Act in question is null and void; and, as a necessary consequence, any assessment made under it must likewise be of no legal effect, and must therefore be quashed.

FISHER, J. :—

I regret that I cannot concur in the judgment of the other members of the Court in this case, and I express my opinion with great deference to my learned brethren. If the words "or extending beyond the limits of the Province," in the first paragraph of the 10th clause of section 92 of the B. N. A. Act, 1867, are to be taken in their literal sense, then, in one view of the question, the 33 Vict., c. 47, is *ultra vires*, as it authorizes the granting of

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debentures to aid in building a railway from Houlton, which is in the State of Maine, to the New Brunswick and Canada Railway in this Province, unless a fair construction of the Act may shew a different intention. I have never been able to satisfy my mind that this was the true meaning of these words. Before the union of the Provinces the legislative powers of each Province were confined to the limits of the Province. It was the object of the B. N. A. Act, 1867, to provide for a Parliament having legislative powers over the whole Dominion, which was constituted by the united Provinces, and a Legislature for each Province. The powers of legislation were distributed between these different bodies. Objects of a general or national character, such as trade and commerce, railway and works running over the whole Dominion, were exclusive subjects of legislation by the Parliament of Canada; whilst the power to legislate upon local matters, and the construction of local works, was conferred upon the different Legislatures. Before the Union, the Legislatures of the respective Provinces were as incompetent to enact a law extending beyond their limits as they now are. The Parliament of Canada has now no power of legislation beyond this Province into the State of Maine. It has authority to pass laws upon various subjects affecting the whole Dominion, and which are in force in every Province. It may incorporate a railway company, or authorise the construction of a railway through the whole Dominion, or a line of telegraph or other such public work. Its legislative power is general, extending over all Canada. The legislative power of each Province is confined to the individual Provinces. It appears to be the object of the exception in the 10th clause of the 92nd section, so to limit the power of the Local Legislatures as to prevent any conflict of the Parliaments in this respect; and, whilst the Parliament of Canada can enact laws affecting each Province, each Local Legislature cannot legislate beyond the Province, and the exception, confining the power of the Local Legislature to other works than those connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province, I think, must necessarily mean works within the Dominion of Canada, because, by extending beyond the limits of the Province into some other of the Provinces, the authority of the Parliament of Canada would be contravened; whilst the extension into the State of Maine would have no such effect, as the Parliament is as powerless to legislate there as the Local Legislature, and there would be no object for such limitation of power.

The next paragraph expressly refers to foreign countries ; and if the first paragraph was intended to include a foreign country, it would not have been necessary to make special provision therefor in the case of a line of steamships in the second. By construing the Act in this way, each paragraph of the clause has a distinct meaning, indicating the object of the different paragraphs and provisions ; and if this be not the construction, the second paragraph is useless, for, if the words " extending beyond the limits of the Province " in the first paragraph, mean a foreign country, it includes, not only railways and telegraph lines, but lines of steamships, and the latter are the subject of a distinct enactment in the second paragraph, which could only have been inserted to provide for a state of things not in the contemplation of the first. I cannot reconcile these exceptions with the general object and purpose of the Act by any other construction. As the authority conferred by the 30 Vict. c. 54, incorporating the Houlton Branch Railway Company to build a railway, is confined to a line from the intersection of the Woodstock line with the New Brunswick and Canada Railway to the boundary of the State of Maine, I will not presume that the St. Stephen contribution of debentures was appropriated to any other object than is contemplated by the Act of incorporation, especially as the town of Houlton is by the Statute 33 Vict. c. 47, stated to have contributed towards the construction of this road. The Legislature was clearly authorised, in my view of the law, to enable the people of St. Stephen to contribute towards the construction of that portion of the line within the Province, and the most reasonable presumption is that they did so. If there was anything in the Act 30 Vict. c. 54, which would come within the exclusive powers of the Parliament, it is saved by the 129th section of the B. N. A. Act, 1867, and never having been repealed, altered or amended in any way, is still in force. It also appears to me that the Act 33 Vict. c. 47, comes within the category of powers provided for in the 16th clause of the 92nd section of the B. N. A. Act, 1867, being purely a matter of a local nature. It is difficult to discover any provision, in the exclusive powers of the Parliament, that may be fairly construed to meet this case ; and it cannot be contended that the B. N. A. Act is so construed as to prevent localities from granting aid to attain some local object, or receive some advantage purely local. The fair construction in this respect appears to be that the authority conferred upon the Parliament to raise money by any mode or system of taxation was for the purposes of the General Government or of the

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whole Dominion, to enable the Parliament and Government to discharge the duties and obligations cast upon the Dominion, and the taxation for local purposes is confined to the Legislatures of each Province. Nothing can be more local than the Act 33 Vict. c. 47, for its enactment is made contingent upon a favourable vote of the ratepayers of the locality desiring the railway. The whole subject is as local as can well be conceived. There is the small locality, comprising the most thickly populated portion of the parish of St. Stephen, connected with the New Brunswick and Canada Railway, which terminated at Woodstock, in the county of Carleton, who desire the connection with Houlton, a small town in the State of Maine, which has no railway connection with any other place. Each of these localities agreed to give a subsidy to build the line to the boundary of the Province, the town of Houlton giving \$30,000 for the portion lying within Maine, and the St. Stephen district giving \$15,000 toward the construction of the line within this Province to the boundary. The reason of the inequality of the subsidy for nearly the same distance of railway is explained by referring to the 6th section of the 30 Vict. c. 6, intituled "An Act to facilitate the construction of certain railways," which grants a subsidy from the Province of \$5,000 per mile for the construction of the road therein styled a branch line from the railway leading from St. Andrews to Woodstock, and which is designated the New Brunswick and Canada Railway. If there could be any doubt upon this point, and it is material, the Act to facilitate the construction of railways clearly shews for what purpose this aid within the Province was granted, and that it was to secure the construction of that part of the road leading to Houlton, which was within the Province. I have not adverted to the 13th clause of the 92nd section of the B. N. A. Act, 1867, which gives to the Local Legislatures exclusive power to legislate upon property and civil rights, which must comprehend a case of the kind under consideration, because it does not appear to me to be of the class of cases referred to in the 10th clause of the 92nd section of the B. N. A. Act, and it does appear to me to come under the general authority to tax for local purposes, the Local Legislature having granted aid to objects of a local nature. For this reason, I am of opinion the rule should be discharged.

*Rule absolute to quash the assessment.*

[PRIVY COUNCIL.]

THE ATTORNEY-GENERAL FOR QUEBEC, } . . . . Plaintiff,  
PRO DOMINA REGINA,

AND

THE QUEEN INSURANCE COMPANY . . . . . Defendant.

J. C.\*  
1878  
July 5.

*On appeal from the Court of Queen's Bench for the Province of Quebec,  
Canada.*

[*Reported 3 App. Cas. 1090.*]

*Powers of Provincial Legislature—B. N. A. Act, 1867, s. 92, sub-s.  
2, 9—Licenses—Stamps—Direct Taxation.*

The clauses of the Act 39 Vict., c. 7 (passed by the Legislature of Quebec), which impose a tax upon certain policies of assurance and certain receipts or renewals, are not authorized by the B. N. A. Act, 1867, s. 92, sub-s. 2, 9.

A license Act by which a licensee is compelled neither to take out nor pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee, but by the person who deals with him, is virtually a Stamp Act and not a License Act.

The imposition of a stamp duty on policies, renewals, and receipts with provisions for avoiding the policy, renewal, or receipt in a Court of Law, if the stamp is not affixed, is not warranted by the terms of an Act which authorizes the imposition of direct taxation.

Appeal from a judgment of the Court of Queen's Bench above named (Dec. 14, 1877), affirming a judgment of the Superior Court for Lower Canada sitting at

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\*Present:—Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and the Master of the Rolls (Sir G. Jessel).

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Montreal (April 12, 1877), whereby the Appellant's action and demand were dismissed.\*

The action was for the recovery of three penalties of \$50 each, incurred under the provisions of an Act of the Legislature of Quebec, intituled "An Act to compel assurers to take out a license," being chapter 7 of the Statutes of Quebec of 1875 (39 Vict.), which received the royal assent on the 24th of December, 1875, and enacts in effect that every assurer carrying on in the Province of Quebec any business of assurance other than that of marine assurance exclusively, shall be bound to take out a license in each year, and that the price of such license shall consist in the payment to the Crown for the use of the Province at the time of issue of any policy, or making or delivery of each premium, receipt or renewal, of certain percentages on the amount received as premium on renewal of assurance, such payments to be made by means of adhesive stamps to be affixed on the policy of assurance, receipts, or renewals, and imposes for each contravention of the Act a penalty of \$50.

The question decided in this appeal is, whether such Act of the Legislature of Quebec is constitutional and within the powers conferred upon that Legislature by the Act of the Imperial Parliament called the British North America Act, 1867.

The sections of the B. N. A. Act, 1867, material to this question, are the following:—

"Sect. 91. It shall be lawful for the Queen, by and with the consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater

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\* See post, p. 131.

certainty, but not so as to restrict the generality of the terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

“2. The regulation of trade and commerce.

“3. The raising of money by any mode or system of taxation.

“Sect. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

“2. Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes.

“9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes.”

The material sections of the Act of the Legislature of Quebec are the following:—

“1. Every assurer carrying on in this Province any business of assurance, other than that of marine assurance exclusively, shall be bound to take out a license before the first day of May in each year, from the revenue officer of the district, wherein is situate his principal place of business or head agency, and to remain continually under license.

“2. The price of such license shall consist in the payment to the Crown for the use of the said Province, at the time of the issue or delivery of any policy of assurance, except of marine assurance, and at the time of the making or delivery of each premium, receipt or renewal, respecting any policy issued before or after the coming into force of this Act, of a sum computed at the rate of 3 per cent. as to assurances against fire, or of

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1 per cent. as to other assurances for each \$100 of the amount received as premium or renewal of assurance, by the assurer, his agent or employee.

"And such payment shall be made by means of one or more adhesive stamps, equivalent in value to the amount required, to be affixed by the assurer, his agents, officers, or employees, on the policy of assurance, receipt, or renewal, as the case may be, at the time of drawing up, issue, or delivery thereof.

"5. Every assurer bound to take out a license under the present Act, for whom, or in whose name, any policy of assurance, or any premium, receipt, or renewal, shall have been delivered without the same having been stamped to the amount required, shall be liable in each case to a penalty not exceeding \$50, or in default of payment, unless such assurer be a corporation, to imprisonment not exceeding three months.

"8. The word 'assurer,' used in this Act, means and includes all persons, firms, corporations, and all companies, societies, or associations, whether incorporated or unincorporated, carrying on the business of assurance on life, or against fire or accidents, or the business of guaranteeing public functionaries or other employees, or any other assurance business whatsoever.

"10. The Act shall not affect any policy, premium, receipt, or renewal, in relation to assurances wherever the interests assured are beyond the limits of this Province."

The Respondent company is a corporation which carried on the business of insurance against fire in Montreal. It did not take out a license under the Quebec Act, 39 Vict. c. 7, but nevertheless issued three several policies of insurance mentioned in the declaration, and did not affix thereto the policy stamps required by the said Act.

The action was brought on the 21st of September,

1876, to recover the penalties provided by the Act, namely, the sum of \$150 currency.

The Respondents, by their plea, after pleading the B. N. A. Act, 1867, also pleaded Canada Act, 31 Vict. c. 48, and alleged, and it was admitted to be the fact, that they had deposited in the hands of the Receiver-General of the Dominion of Canada, in manner provided by the last mentioned Act, and by the subsequent amendment of that Act passed by the said Parliament of Canada, \$150,000 for the purposes in the said Act described, and had given all the notices, performed all the formalities, and conformed themselves in all respects to the provisions of the said Acts and of the Act amending the same, and that they had obtained a license from the Minister of Finance of the Dominion of Canada, and were thereby licensed to carry on their business in Canada of fire and life insurance, that the said license remained in force until the 31st of March, 1876, and was then renewed by the Minister of Finance of the Dominion of Canada under and by virtue of the statutes in such case provided, until the 31st of March, 1877, and that at all times mentioned in the said declaration the respondents were the holders of the license, and extension of license, issued under the above mentioned Acts of the Parliament of Canada, authorizing them to transact business of insurance in any part of the Dominion of Canada.

The Respondents by their said plea prayed that the said provisions of the said Act of the Legislature of Quebec might be declared to be unconstitutional and illegal, and in so far as respects the Respondents that they might be annulled and set aside and declared to be of no force or effect.

The Appellant, in his answer to the Respondents' plea, admitted that the Respondents were entitled to transact the business of insurance, and had conformed to the

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laws of the Dominion Parliament actually in force, but had not conformed to the law of the Provincial Legislature; and he also maintained that the said Act of the Legislature of Quebec was constitutional, and that the said Legislature had a right to pass it, and that it was then the law of the land.

From the notes of the reasons given by the learned Judges of the Court of Appeal, it appears that they agreed that the tax sought to be imposed was not a direct tax, and therefore did not come within sect. 92, sub-sec. 2, of the B. N. A. Act, 1867.

Chief Justice Dorion considered that the tax was not within revenue raised by licenses under sub-sec. 9, and that the Act of the Legislature of Quebec clashed with the provision of the B. N. A. Act, 1867, giving the Dominion Parliament the exclusive right to make laws for the regulation of trade.

Mr. Justice Monk held that the Provincial Legislature had not the power to impose licenses on insurance companies, no such power having been expressly given to it; and that the Dominion Legislature having exercised the power of licensing the Respondents, the Provincial Legislature could not restrict the exercise of this power.

Mr. Justice Tessier considered that if the Legislature of Quebec had confined itself to imposing a license on insurance companies, such license might have been covered by sect. 92, sub-sec. 9, of the B. N. A. Act, 1867, and been within the "other licenses" there specified. But the Legislature, he held, had gone beyond its jurisdiction in imposing penalties on the companies, and declaring that policies issued without stamps should have no effect, and thus hindering the companies from carrying on operations which they were licensed by the Dominion Government to carry on within the Provinces.

Mr. Justice Taschereau said the claim of the Pro-

vincial Legislature was founded upon sect. 92, sub-sec. 9, of the B. N. A. Act, 1867. This tax, however, was not a license duty but a stamp duty, the license being introduced only to make the legislation fit in with the sub-section. The revenue was raised, not from the license, but from the stamps, and as the sub-section expressly provided that the license was to be in order to the raising of a revenue, this was not such a license as was contemplated. He also considered that the words, "other licenses," were limited by the foregoing words, and that insurance companies could not be said to be *ejusdem generis* with shops, etc. That if the Provincial Legislatures had this power in regard to insurance companies, they would have it in regard to banks, railway companies, etc., and under the form of a license their power of indirect taxation would become so great as to render unnecessary resort to direct taxation.

Lastly, he argued the company was a commercial company, and the Act in question was repugnant to the clause of the B. N. A. Act, 1867, reserving the regulation of trade and commerce to the Dominion Parliament.

Mr. Justice Ramsay considered that the exclusive power of taxation given to the Dominion Parliament by the B. N. A. Act, was to employ any mode or system of taxation for general purposes, and that the tax in question was a license to assurers in order to raise revenue for Provincial purposes. This purpose being legal, he held that it was immaterial how the assurer was repaid, and that the license came within the "other licenses" mentioned in sect. 92, sub-sec. 9.

Mr. Benjamin, Q.C., and Mr. Rigby, for the Appellant, contended that the provisions of the Quebec Act, 39 Vict., c. 7, did not conflict or interfere with the exclusive rights and powers of the Dominion Parliament.

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They referred to the B. N. A. Act, 1867, sects. 91 and 92, which they contended were self-contradictory and very difficult of construction. The general scope of the Act is that the Dominion Parliament regulates public property, debt, and commerce. The general power of taxation, *i.e.*, the power of raising money for Dominion purposes, belongs to the Dominion Parliament; but special powers of taxation were also given to the Provincial Legislature, and may co-exist with the more general powers of a similar class conferred on the Dominion Parliament. Those special powers when examined in detail shew the purpose of the Legislature. There is an express grant to the Provincial Legislature (see sect. 92, sub-sect. 9), of a power to make laws relating to licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes. Having regard to sect. 129, it is necessary to refer to the powers of taxation granted by the Constitution of the United States; and on that subject, see *Hylton v. United States* (1), and *License Cases*, *Thurlow v. Commonwealth of Massachusetts* (2). As to the legislation regarding licenses previous to the Act of 1867, and in reference to which that Act ought to be construed, see *Consolidated Statutes, Lower Canada*, p. 13, c. v.; and as respects the contention of the Respondent that it was an evasion to call this a license at all, see *ibid.* pp. 13, 15, 22, 39, 44, 46. As regards the contention that the Provincial Legislature was depriving the Respondent of rights conferred by Canada Act, 31 Vict., c. 48, that Act was a police regulation, and not a Revenue Act, *cf.* *English Act*, 34 Vict., c. 61. But if it were in contravention of the Dominion Act, there was a power to disallow such statute. (*See B. N. A. Act, 1867, sects.*

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(1) 3 Dallas, pp. 171, 182.

(2) 5 Howard's Rep., pp. 504, 574.

56, 90.) Reference was also made to 6 Geo. IV. c. 81; 6 Geo. IV. c. 58, s. 2.

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But even if this be not a license tax within sect. 92, sub-sect. 9, of the Act of 1867, it was direct taxation under sub-sect. 2 of sect. 92. It is impossible to classify scientifically direct and indirect taxes. It depends in each case upon the surrounding circumstances whether an apparently direct tax turns out to be indirect in its operation or *vice versa*.

Mr. Kay, Q.C., and Mr. F. W. Gibbs, for the Respondent company, were not called upon.

The judgment of their Lordships was delivered by  
THE MASTER OF THE ROLLS (SIR G. JESSEL):—

In this case their Lordships do not intend to call upon the counsel for the Respondents.

This is an appeal from a judgment of the Court of Queen's Bench in Canada, affirming a judgment of the Superior Court of the District of Montreal. The judgment appealed against was unanimous on one of the two points to which the appeal relates, and was decided by four Judges against one on the other. The real decision was that the clauses of a statute of the Province of Quebec, 39 Vict. c. 7, which imposed a tax upon certain policies of assurance, and certain receipts or renewals, were not authorized by the Union Act of Canada, Nova Scotia, and New Brunswick, which entrusted the Province, or the Legislature of that Province, with certain powers. And the sole question their Lordships intend to consider is, whether or not the powers conferred by the 92nd section of the Act in question are sufficient to authorize the statute which is under consideration?

It is not absolutely necessary to decide in this case

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how far, if at all, the express enactments of the 92nd section of the Act are controlled by the provisions of the 91st section, because it may well be that, so far as regards the two provisions which their Lordships have to consider—namely, the sub-sections 2 and 9 of the 92nd section—those powers may co-exist with the powers conferred on the Legislature of the Dominion by the 91st section. Assuming that to be so, the question is, whether what has been done is authorized by those powers?

The first power to be considered, though not the first in order in the Act of Parliament, is the 9th sub-section. The Legislature of the Province may exclusively make laws in relation to "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes." The statute in question purports to be, on the face of it, in exercise of that power. It enacts that every assurer, except people carrying on marine insurance, shall be bound to take out a license before the 1st day of May in each year, from the revenue officer of the district, and to remain continually under license. It then, by the 2nd section, enacts what the price of the license is to be. And reading it shortly, it amounts to this: that the price of the license shall consist of an adhesive stamp affixed to the policy, or receipt, or renewal, as the case may be. The amount of the adhesive stamp is to be, in the case of fire, 3 per cent., and 1 per cent. for other assurances on the premiums paid. Then the 4th section enacts that anybody who, on behalf of an assurer, shall deliver any policy, or renewal, or receipt, without the stamp, shall be liable for such contravention to a penalty of fifty dollars. The 5th section says that every assurer bound to take out a license shall be liable in such a case to a penalty not exceeding fifty dollars if it

has been delivered without an adhesive stamp. The 6th section says that every person who affixes the stamp shall be bound to cancel it so as to obliterate it, and prevent its being used again. And the 7th makes all policies, premium receipts or renewals, not stamped as required by the Act, invalid. It says they "shall not be invoked, and shall have no effect in law or in equity before the Courts of this Province." Then there are certain sections of the Quebec License Act which are incorporated, and the Act is not to apply to assurances not within the Province. The only provision of the Quebec License Act which it is necessary to refer to is the 124th: "For every license issued by a revenue officer there shall be paid to such revenue officer, over and above the duty payable therefor, a fee of one dollar by the person to whom it is issued."

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Now, the first point which strikes their Lordships, and will strike every one, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the license, and, what is more singular, is not compelled to take out a license, because there is no penalty at all upon the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although no license has been taken out at all. The result, therefore, is, that a license is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a license. They say on the face of the statute, "The price of each license shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that

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the Company buys the adhesive stamps, and affixes them ; or pays an officer of the Company the money necessary to purchase them and affix them ; but whoever does it complies with the Act.

Another observation which may be made upon the Act is this : that if you leave out the clauses about the license, the effect of the Act remains the same. It is really nothing more nor less than a Stamp Act if you leave out those clauses. If you leave out every direction for taking out a license, and everything said about the price of a license, and merely leave the rest of the Act in, the Government of the Province of Quebec obtains exactly the same amount by virtue of the statute as it does with the license clauses remaining in the statute. The penalty is on the issuing of the policy, receipt, or renewal ; it is not a penalty for not taking out the license. The result, therefore, is this, that it is not in substance a License Act at all. It is nothing more nor less than a simple Stamp Act on policies, with provisions referring to a license, because, it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license.

If that is so, it is of no use considering how far, independently of these considerations, the 9th sub-section of the 92nd section would authorize a sum of money to be taken from an assurance company in respect of a license. With regard to the precedents cited, it was alleged, on behalf of the Appellants, that though at first sight it might appear that this was not a license, and that this was not the price paid for a license, yet it could be shewn by the existing legislation in England and America that licenses were constantly granted on similar terms ; and that, therefore, in construing the Dominion Act, we

ought to construe it with reference to the other subsisting legislation. Their Lordships think that a very fair argument. But the question is, is it true in fact? When the instances which were produced were examined, it was found that they were of a totally different character. They might be described as licenses granted to traders on payment of a sum of money; but the price to be paid by the trader was estimated either according to the amount of business done by the trader in the year previous to the granting of the license, or with reference to the value of the house in which the trader carried on business, or with reference to the nature of the goods, as regards quantity especially, sold by the trader in the previous year. They were all cases in which the price actually paid by the trader for the license at the time of granting it was ascertained by these considerations. It was a license paid for by the trader, and the actual price of the license was ascertained by the amount of the trade he did. This is not a payment depending in that sense on the amount of the trade previously done by the trader. It is a payment on the very transaction occurring in the year for which the license is taken out, and is not really a price paid for a license, but, as has been said before, a mere stamp on the policy, renewal, or receipt.

As this is the result to which their Lordships come, it becomes necessary to consider the effect of the 2nd subsection of the 92nd section. That authorizes "direct taxation within the Province in order to the raising of a revenue for Provincial purposes." The single point to be decided upon this is whether a Stamp Act—an Act imposing a stamp on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt, in a court of law, if the stamp is not affixed—is or is not direct taxation? Now, here again we find words used

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which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and, in trying to find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the Legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau, in his elaborate judgment, it is not necessary here to more than refer to. But surely if one could have been found in favour of the Appellants, it was the duty of the Appellants to call their Lordships' attention to it. No such case has been found. Their Lordships, therefore, think they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation. Again, no authority on the other side has been cited on the part of the Appellant.

Lastly, as regards the popular use of the word, two cyclopædias at least have been produced, shewing that the popular use of the word is entirely the same in this respect as the technical use of the word. And here, again, there is an utter deficiency on the part of the Appellants

in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that it is necessary for them to say is that finding these words used in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the Legislature of England to include it in the term "direct taxation," and therefore that the imposition of this stamp duty is not warranted by the terms of the 2nd sub-section of section 92 of the Dominion Act. That being so, it appears to their Lordships that the appeal fails, and they will, therefore, humbly advise Her Majesty to affirm the decision of the Court below, and dismiss the appeal.

*Appeal dismissed.*

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JUDGMENTS IN QUEEN'S BENCH.

[*Reported 22 L. C. J., 307.*]

RAMSAY, J. :—

I regret to be obliged to dissent from the judgment about to be rendered in this case, and by which the judgment of the Court below will be confirmed. It is probable I should not have expressed any dissent, if the judgment laid down any tangible principle which could be applied to other cases, for I am not unaware of the objections that may be made to the interpretation I would put upon the law. But the interpretation given by the Court appears to me to be open to every kind of objection. It would be a defensible position to say that the proviso of section 91 so controlled sub-sections 2 and 9 of section 92 as to render them inapplicable, although I do not think that this was the intention of the Imperial Parliament. But the majority of the Court does not adopt that view, and the judgment will not even lay down the rule that the Local Legislature cannot levy a license which may affect matters coming within the scope of Dominion legislation. The whole that the judgment about to be rendered affirms is, that the particular mode of levying a



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license adopted in the statute before us is beyond the powers of the Local Legislature. To make the view I take, clear, I may briefly state that by an Act styled 39 Vict., cap. 7, the Legislature of the Province of Quebec imposed on "every assurer carrying on the business of assurance, other than that of Marine assurance exclusively," the duty of taking out a license from the revenue officer of the district before the first day of May in each year, and to remain continually under license. "The *price* of such license" was to consist of three per cent. on every fire policy, and one per cent. on every other policy, except marine policies. This price was to be collected by adhesive stamps in the manner regulated by the Act.

A number of insurance companies questioned the constitutionality of this Act, maintaining that the right to impose such a tax on assurers was not expressly given to the Provincial Legislatures, and, on the contrary, that it was given to the Dominion Parliament, which has alone the power to regulate trade and commerce. Hence this action.

The local Government, now respondent, contends that it is a license, and that the Local Legislatures have the right to make laws in relation to "Shop, Saloon, Tavern, Auctioneer, and *other Licenses* in order to the raising of a revenue for Provincial, Local or Municipal purposes." It contends further, that, if such a tax is not a license, the Local Legislature is still justified in imposing it as being "direct taxation within the Province in order to the raising of a revenue for Provincial purposes."

The question of the constitutionality of this impost, it will at once be admitted, is one of an embarrassing kind. The form of the statute with regard to sections 91 and 92 is vicious, and some of the terms employed have not a definite signification, while others are not applicable. Thus in section 91 we have the Parliament of Canada endowed with the *exclusive* legislative authority over all matters coming within the enumeration of the section, while in section 92 the Provincial Legislatures "may *exclusively* make laws in relation to matters" within the enumeration of this section. If, unfortunately, the two enumerations clash, we should thus have two *exclusive* jurisdictions over the same matter, which is impossible. The difficulty of a conflict seems to have been to some extent apprehended, for a saving clause is added to section 91 in these words: "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enume-

ration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." In short, the exclusive authority of the Local Legislatures shall yield to the exclusive authority of Parliament. Attempts have been made to explain away the use of the word "exclusive" as applied to the two powers, but it seems to me that they are fanciful and unsound. The exclusive authority of Parliament is absolute, while that of the several Legislatures is only so when the matter does not clash with the powers specially conferred on Parliament. The difficulty of a conflict in the terms of sections 91 and 92 of the B. N. A. Act does not, however, it appears to me, arise in this case. The power to raise revenue for local purposes by licenses or by direct taxation is not in conflict with any matter in section 91. The exclusive power of taxation given to the Dominion Parliament is to employ "any," all and every mode or system of taxation, i. e., for their own or general purposes, not for local or municipal revenue. The power of double taxation may exist. On this all the American authorities are agreed, and on this point American authority is applicable.

It is admitted that the business of insurance belongs to trade and commerce. We have, therefore, to inquire whether the tax imposed by the local Act in question is a license within the meaning of sub-section 9 of sec. 92, B. N. A. Act, or a direct tax within the meaning of sub-section 2 of the same section.

We are unanimously of opinion that, within the meaning of the B. N. A. Act, a duty of the kind in question is not direct taxation. The expression "direct taxation" has been used in so many different ways that it cannot be said to have a technical sense. Its ordinary use is entirely relative, therefore it escapes scientific circumscription. All taxation is direct, strictly speaking. It seems to me, then, that the limit intended by the Act, when it allows direct taxation, is taxation of property and income, or a capitation tax.

As to the other question, I agree with the appellants in thinking that the condition of the license—its "price," according to the phraseology of the statute—does not affect the question, provided it be imposed "in order to the raising of a revenue for provincial, local or municipal purposes." How the assurer is to be repaid, and whether he is to be charged a fixed rate or a percentage on the business, is beside the question. The distinctive mark of the tax styled "license" is that it is voluntary on the part of the party paying it. It is a liberty to do, on certain conditions (in local legislation

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which affects Dominion matters the condition must be in money), that which the law prohibits one from doing without such permission.

But it was contended by the respondent that at any rate the words "other licenses" must be restrained by those enumerated before, "shop, saloon, tavern, auctioneer," and that we must say that other licenses were those of a similar kind, or at all events, that other licenses could only be imposed on such trades or occupations as were subject to license by the legislation existing at the time of passing the B. N. A. Act.

The rule of interpretation referred to is a good one, but it will hardly help the respondent in the present case. It is impossible to find out the *differentia* of any *genus* conveyed by the examples of the numeration. In the efforts to establish a *genus* we are told that "shop" means a shop where drink is sold. I am not sure that there is sufficient ground for saying so; but admit it, and what becomes of the auctioneer's license? It affects trade, and, consequently, is the subject of Dominion legislation; yet it is expressly given, according to respondent's theory, as an illustration of a trade which may be licensed. Again, if we refer to the Municipalities and Roads Act, cap. 24, O. S. L. C., we find that the licenses then contemplated included licenses to ferries, for the sale of spirituous liquors by shopkeepers, tavern-keepers and other retailers, licenses to keep dogs, and for public exhibitions, licenses to pedlars, to common carriers and to all traders, *whether wholesale or retail*.

American authority has been cited to establish that the Courts should interfere where the rate of license complained of is so great as to interfere with trade. I am aware that this has been the motive of American decisions, following the ruling of Chief-Justice Marshall. In spite, however, of the authority of these decisions, the objection to them is so manifest that it can hardly be said they have been acquiesced in even in the United States. In fact, it is difficult to conceive any institution less fitted to decide the practical question of what amount of taxation this or that branch of trade could support without inconvenience, than a court of law. Again, it should be observed that there is a fundamental difference between our constitution and that of the United States. Here the powers of the Legislatures and Governments are partitioned by a supreme authority, which has given to the Dominion organization not only all unassigned powers, not purely of a private or local nature, but also specially the power to control absolutely, by disallowance, the legislation of the Provinces. In the United States the central

government holds its authority from the States, and has no power over the States' legislation other than that it may acquire through the Supreme Court. Here, then, we have by the constitution a complete check on any practical inconvenience arising from the abuse of the powers confided to the Provincial Legislatures, which is entirely wanting in the constitution of the United States—a defect which may justify to some extent the decisions there on this matter.

If may perhaps be said the Provincial Governments are jealous of any interference with their legislation, and that the Dominion Government does not like to meddle with it. This may be. The spirit of insubordination is tolerably active in the present age, but I do not see that we are called upon to perform a duty for which we are totally unfit, to relieve from responsibility those who ought to be, of all others, the most competent to decide the question of policy. Nor does it seem to me that the difficulty involved is very great. The Local Legislature must qualify the tax as a license, otherwise it would not be within sub-section 9, and it surely would not be considered as an impertinent interference to stop local legislation which, under the guise of a license, really created a prohibition or serious trammel to any branch of trade.

It seems to me, therefore, that the object of the Imperial Parliament in granting to the Local Legislatures the power to raise revenues for their purposes by means of licenses, was to give a power to tax, even though the tax did not fall within any definition which might be applied to "direct taxation," and although it might charge some matter falling within the scope of Dominion legislation, subject always, as all other legislation, to the controlling power of the Dominion Government.

I am, therefore, of opinion that the appeal should be maintained, and that the judgment of the Court below should be reversed.

[*Reported 16 C. L. J., N. S. 198.*]

TASCHERRAU, J. :—

By the Act of the Legislature of Quebec, 39 Vic., c. 7, entitled "An Act to compel Assurers to take out a License," it is enacted that "every assurer carrying on, in the Province, any business of assurance other than that of marine assurance exclusively (or business of assurance against accidents, for a period less than 30 days—40 Vic., c. 6), shall be bound to take out a license in each year from one of the revenue officers, the price of such license to

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consist in the payment to the Crown, for the use of the Province, at the time of the issue or delivery of any policy of assurance, and at the time of the making or delivery of each premium, receipt or renewal respecting such assurance, of a sum computed at the rate of three per cent. as to assurance against fire, or of one per cent. as to other assurances, for each hundred dollars, or fraction of one hundred dollars, of the amount received as premium, or renewal of assurance; and such payment was to be made by means of adhesive stamps, equivalent in value to the amount required, to be affixed on the policy of assurance, receipt or renewal." Any person who shall not comply with the provisions of this Act is made liable for each contravention to a penalty not exceeding fifty dollars, or in default of payment, unless the person be a corporation, to imprisonment not exceeding three months. The Act further declared that policies of assurance, premium receipts or renewals, not stamped as required by the Act, could not be invoked, and are to have no effect in law or in equity before the Courts of this Province.

By the 122nd section of "The Quebec License Act," which is made applicable to the above Act (sec. 9), the Governor in Council may at any time, for sufficient cause, in his discretion revoke and annul any license thus granted to any Insurance Company; and by the 124th section of the same Quebec License Act, a fee of one dollar is payable to the revenue officer for every license given by him.

Had the Legislature of Quebec power to pass this statute? This is the question submitted for our decision in this cause, and the only matter of dispute between the parties.

In England, Parliament is omnipotent. The power of Parliament is absolute and supreme, and Hallam (Const. Hist., Vol. III., p. 193) has not hesitated to say that "the absolute power of the Legislature, in strictness, is as arbitrary in England as in Persia." In this country it is very different since Confederation; both the Federal Parliament and the Local Legislatures have limited powers.

It is true that the Federal Parliament has a quasi sovereignty. The jurisdiction is far greater than that of the Local Legislatures, but there are subject-matters over which it has no jurisdiction. They are those matters which, by the B. N. A. Act, are left, without any concurrent jurisdiction in the Federal Parliament, to the jurisdiction of the Local Legislatures.

The latter have only such powers as are specially assigned to

them, and which are, by exception, taken from the Federal and given to the Local Legislatures.

Let us examine, therefore, whether, under the distribution of the legislative powers given by the Imperial statute, the Legislature of Quebec could pass this statute, imposing a tax on Assurance Companies, and compelling them to take out a license.

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The 91st section of the Imperial Act enacts that "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act exclusively assigned to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say (*inter alia*):

"2nd. The regulation of trade and commerce. 3rd. The raising of money by any mode or system of taxation; . . . and any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." This refers to the Federal Parliament. In dealing with the powers of the Legislatures of the Provinces, the 92nd section declares that "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say (*inter alia*):

"2nd. Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes. 9th. Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes."

The other parts of these sections have no bearing on the present case.

The determination of this question depends entirely on the construction to be put on sub-sections 2 and 9 of the above 92nd section of the Imperial statute.

The Federal Parliament has the general power to make laws in relation to all matters, excepting only such matters as are by the 92nd section specially put under the control of the Local Legisla-

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tures. The Local Legislatures, on the contrary, have power to make laws only in relation to matters specifically and nominally put under their control by section 92. In order to ascertain whether any given subject-matter is under the jurisdiction of one of the legislative bodies created by the Imperial statute, it is sufficient to refer to the 92nd section, and see if by that section the subject-matter is or is not put under the control of the Provincial power. If not, it comes within the legislative authority of the Federal Parliament, even if not one of the classes of subjects specially enumerated as being specially reserved for that Parliament by the 91st section of the Act.

This proposition was not contested by the learned counsel whose duty it has been to contend in favour of the constitutionality of this Act, but it is on the 92nd section that he relies to prove that the Legislature of Quebec had the legislative authority to pass this statute. He contended that it might be possible to consider the taxes imposed by 39 Vic., c. 7, as a direct tax. Then, under the 2nd sub-section of section 92, which gives the power of direct taxation to the Legislatures of the Provinces, this Act is unimpeachable. But should it be declared that the duties imposed were not a direct tax, then, he says, the Act is nevertheless constitutional, because it is authorized by the 9th sub-section, which gives to Local Legislatures the control of "shop, saloon, tavern, auctioneer and other licenses."

As to whether the duties imposed on these Companies constitute a direct or an indirect tax, I will state without hesitation that, in my opinion, they constitute an indirect tax. It is a stamp duty which has been imposed by the Legislature on policies of assurance and renewal receipts respecting such policies, and nothing else. That it ought to be considered a stamp duty or a license does not make any difference, as it is in both cases an indirect tax.

"On peut ranger sous deux chefs principaux (says J. B. Say, an author of great repute on Political Economy), les différentes manières qu'on emploie pour atteindre les revenus des contribuables. Ou bien on leur demande directement une portion du revenu qu'on leur suppose, c'est l'objet des contributions directes; ou bien on leur fait payer une somme quelconque sur certaines consommations qu'ils font avec leur revenu; c'est l'objet de ce qu'on nomme en France les contributions indirectes."

After stating what are direct taxes, the same author says: "Pour asseoir les contributions indirectes et celles dont on veut frapper les

consommations, on ne s'informe pas du nom du redevable, on ne s'attache qu'au produit. Tantôt, dès l'origine de ce produit on réclame une part quelconque de sa valeur, comme on fait en France pour le sel. Tantôt cette demande est faite au moment où le produit franchit les frontières (les droits de douanes). Tantôt, c'est au moment où le produit passe de la main du dernier producteur dans celle du consommateur qu'on fait contribuer celui-ci (en Angleterre par le stamp duty, en France par l'impôt sur les billets de spectacles). Tantôt le gouvernement exige que la marchandise porte une marque particulière, qu'il fait payer, comme le contrôle de l'argent, les timbres des journaux. Tantôt il frappe non la marchandise elle-même mais l'acquittement de son prix, comme il le fait par le timbre des quittances et des effets de commerce. Toutes ces manières de lever les contributions se rangent dans la classe des contributions indirectes parce que la demande n'en est adressée à personne directement mais au produit où à la marchandise frappée de l'impôt." (Say, "Economie Politique," pp. 521, 523.)

All our text-writers and jurists agree in giving the definition of indirect taxes in the same language as that I have just cited. I will only add two others—Favard de Langlade and Merlin. The former says: "On appelle contributions indirectes les contributions établies par la loi sur les choses dont l'usage est ordinaire dans les habitudes de la vie. Elles sont indirectes en ce qu'elles ne portent nominativement sur aucun contribuable qu'elles ne sont acquittées que par le consommateur quel qu'il soit, ou celui qui veut user et qu'il suffit de ne pas consommer ou user pour n'y être pas assujetti, ainsi par exemple celui qui ne se sert pas de papier timbré et n'use pas de tabac est sûr de ne payer aucune partie des droits établis pour le timbre et sur les tabacs. Il en est de même pour toutes les branches des contributions indirectes." (Favard de Langlade, *Repert. V. Contributions Indirectes*.)

And Merlin (*Repert. V. Contributions Indirectes*) says: "On distingue deux sortes de contributions, les contributions directes et les contributions indirectes. Les contributions directes sont établies directement sur les personnes. Les contributions indirectes sont, suivant la définition qu'en donne la loi en forme d'instruction du 8 Janvier, 1790, tous les impôts assis sur la fabrication, la vente, le transport et l'introduction de plusieurs objets de commerce et de consommation, impôts dont le produit ordinairement avancé par le fabricant, le marchand, ou le voiturier, est supporté et indirectement payé par le consommateur. C'est aussi à cette classe qu'ap-

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partiennent les droits sur les tabacs, sur les cartes à jouer, sur le sel, sur les boissons," etc., etc.—*See also Demeunier, Economie Politique, Vol. III., V. Impôts.*

There cannot be, in my opinion, a shadow of doubt that the duties imposed on the Assurance Companies by the Legislature of Quebec, let them be called licenses or stamp duties, come distinctly within the definition given by the French authors, and should be classed in the category of indirect taxes.

If I now examine the English authors, I also find it impossible to declare that these duties on the Assurance Companies fall into the category of direct taxes.

"Taxes are either direct or indirect," says Mill. "A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another, such as the excise or customs. . . . Most taxes on expenditure are indirect, but some are direct, being imposed, not on the producer or seller of an article, but immediately on the consumer."—2 Mill, *Pol. Econ.*, p. 415. *See also same volume, pp. 432, 458, 465, 466.*

"A direct tax operates and takes effect independently of consumption or expenditure, while indirect taxes affect expenses or consumption, and the revenue arising from them is dependent thereon."—3 Smith's *Wealth of Nations*, pp. 3, 11 (10th Edit.) Taxes on operation, and those on commodities, are put in the same category. *See Macdonnell, A Survey of Political Economy*, p. 346. *See also 2 Smith's Wealth of Nations*, by Rogers, pp. 413, 466; and McCulloch's *Principles and Practical Influence of Taxation and the Funding System*, pp. 1 and 242.

In the United States, the distinction between direct and indirect taxes is made upon the same principles as those upon which the English and French authors above cited make it.

Hilliard—*Law of Taxation*, par. 60—says a license on particular pursuits is an indirect tax.

In the case of *Loughborough v. Blake* (1), Chief Justice Marshall, speaking of the celebrated duties which were the immediate cause of the American Rebellion, says, "Neither the Stamp Act nor the duty on Tea were direct taxes."

In the *Veazie Bank v. Fenno* (2), a direct tax was held to be solely "a tax upon land or its appurtenances, or upon polls."

In *Pacific Insurance Co. v. Soule* (1), an income tax on the premiums, assessment and dividends of an Insurance Company was held not to be a direct tax, but a duty of excise.

The duties imposed by the Legislature of Quebec on the Assurance Companies seem very much to be an indirect tax on the premiums; moreover, cannot these duties be said to be excise?

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What is excise? "Excise is the name given to the duties or taxes laid on certain articles produced and consumed at home; but, exclusive of the duties on licenses, auctioneers and post horses, etc., etc., are included in the excise duties." (Wharton, *Law Lex. V. Excise*.)

McCulloch's *Dict. of Com. V. Excise*, gives its definition in very much the same terms—"As a part of excise, the rates of duties on licenses are included as upon auctioneers, brewers," etc., etc.—McCulloch on the Principles and Practical Influence of Taxation and the Funding System, p. 242; and at page 321, "The licensing of lotteries is also a mode of raising a revenue by indirect taxation." In fact, all authors agree in placing excise duties in the category of indirect taxes.

Another author in the United States says: "Taxes are usually divided into direct and indirect. The former includes assessments made upon the real and personal estate of the taxpayer—upon his income or upon his head; the latter comprises duties upon imports and exports, excises, licenses, stamp duties and the like." (Ripley's *Amer. Cyclopaedia. V. Taxes*.) It would seem that even in the B. N. A. Act the legislator did not consider that licenses were a direct tax. Had it been the intention to consider licenses as a direct tax, it would not have been necessary, after having given to the Local Legislatures, by sub-section 2, the power to impose direct taxes, to have repeated in the 9th sub-section that the right to impose licenses on certain subjects was also within the legislative authority of the Provincial Legislatures. Does not the Act in so many words declare that the Local Legislature shall have power to impose direct taxation, but as to indirect taxation, its power is limited to "shop, saloon, tavern, auctioneer, and other licenses?"

In the case of *Regina v. Taylor* (2), all the judges composing the Court of Queen's Bench, as well as those of the Court of Error and Appeal—to wit, Draper and Richards, C.JJ., and Morrison, Wilson, Strong, Burton and Patterson, JJ.—were of opinion that a license

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to be paid for by a brewer or by a person to sell by wholesale, was an indirect tax. In the present case, the character of the tax seems still more clearly established to be an indirect tax. For all these reasons, the tax imposed on the Insurance Companies is not a direct tax, and therefore, under sub-section 2 of the 92nd section of the B. N. A. Act, the Local Legislature had no power to impose it. On this point there is no difference of opinion amongst us.

Moreover, it was not on the 2nd sub-section that the Legislature relied in order to pass this statute in reference to Insurance Companies, or that they supposed that they were for the first time thereby imposing a direct tax in the Province of Quebec. The 9th paragraph of the 92nd section is alone relied on as giving the Legislature authority to pass the statute. This is the sub-section which gives to the Local Legislatures control over "shop, saloon, tavern, auctioneer and other licenses," in order to the raising of a revenue for Provincial, local or municipal purposes. And it is principally in the words "and other licenses" that the power to impose this tax on Insurance Companies is said to exist.

Let us see if by the words "and other licenses" the Provincial legislative authority is so very much enlarged.

It is clear, on the simple reading of the Quebec Act, that the formality of taking out the license was thought of in order that the intended legislation should come within the authority of this 9th sub-section of the 92nd section of the Imperial statute. Nevertheless, it is a "stamp duty" that has in reality been created; for although there is a penalty of \$50 imposed in case of policies or renewal receipts issued without the required stamps affixed, yet we do not find any penalty imposed if an Insurance Company does not take out the license.

If the Company defendant in the case, the Queen Insurance Company, had affixed stamps on its insurance policies, it would not have been subjected by the statute to any penalty for having refused or neglected to take out a license from the revenue officer.

The Act, it is true, enacts that each Company shall take out a license, but this license is not for the purpose of "the raising of a revenue for Provincial, local, or municipal purposes." The dollar which is charged as the cost of or price of the license, is a fee which is paid personally to the revenue officer. Now, by the express terms of the Imperial statute it can only be for the raising of a revenue for Provincial, local, or municipal purposes, that a license may be imposed.

If, as in the present case, the license does not raise any money for any of these purposes, the Legislature of the Province has no power to impose it, and the statute imposing it must be declared *ultra vires*.

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An Insurance Company need not take out any license, and thereby will not be subject to any penalty under this statute; provided the policy and renewal receipts have stamps affixed, the object of the legislation has been attained. How can it be said that in such a case the license has produced a revenue, when it is not even in existence?

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I say, therefore, that by the express terms of the Imperial statute a license can be imposed only in order to raise a revenue. Here, on the face of the statute under consideration, the license which the Companies are to take out cannot and could not produce a revenue. The result is that this legislation is not authorized by the Imperial statute.

I will now consider this case in its most favourable light for the Provincial Legislature—it is by admitting that the duties imposed are really license duties payable in stamps, on the transactions of the Insurance Companies.

Let us see whether the Legislature of Quebec had authority to pass such a law. First, can Insurance Companies be comprised in the words “and other licenses,” which follow the words “shop, saloon, tavern, auctioneer,” in sub-section 9 of section 92 of the Imperial Act? That is the question. A well-known rule of construction of statutes will solve this question. It is the rule which declares that “general words will be restrained to things of the same kind with those particularised.” Under this rule it cannot be contended that Insurance Companies are comprised in the three words “and other licenses” of the Imperial statute, for it cannot be said that they are *ejusdem generis*, as “shop, saloon, tavern, auctioneer,” which precede the words “and other licenses.” This rule has been adopted in the United States as well as in England, and it has been held that a statute which speaks of auctioneers, etc., and all other trades, avocations, or professions whatever, does not include lawyers: Sedgwick, Cona. of Stat. and Cons. Law. This rule is based on common sense, which naturally leads one's mind to think first of the most important subjects comprised in a subject-matter with which it may be occupied. Is it reasonable to think that the legislator would have enumerated specially “shop, tavern,” etc., and would have left Insurance

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Companies as being comprised in the words "and other licenses?" If it had been intended to give to the Provincial Legislature authority to license Insurance Companies, would they not have been specially mentioned? There is no doubt they would have been named first of all.

And what would naturally have struck the mind of the Legislature at the time, in order that they might not be unintentionally omitted, is that Insurance Companies by law were then obliged to take out licenses: 23 Vic., c. 33; 26 Vic., c. 43. See also 38 Vic., c. 20, and 40 Vic., c. 42.

They are much more important than "shop, tavern," etc., which have been particularly mentioned, and the Legislature cannot have intended, by adding the words "and other licenses," to have included in these words the power to tax institutions or industrial concerns which are so much superior to those mentioned immediately preceding these words.

This was the view taken in the case of the Archbishop of Canterbury (1): "A statute treating of persons or things of an inferior rank cannot by general words be extended to those of a superior." This rule is applicable to every section of an Act, unless the contrary appears from the context of the whole Act. Now, by referring to the Imperial Statute, I find, in reading the whole Act, that, far from being unable to make the application of this rule to this section, it is evident, more especially so by referring to the 91st section, which regulates the legislative powers of the Federal Parliament (a clause to which I will more particularly refer hereafter), that the words "and other licenses" mean and are intended to include other licenses of the same kind, *ejusdem generis*. In the case of *Sandiman v. Breach* (2), it was held, "Where general words follow particular words, the rule is to construe the former as applicable to the things or persons particularly mentioned. See also *Dwarris*, 656, and *Maxwell on Statutes*, 297.

Another consideration which strikes my mind is, that if Insurance Companies are comprised in the words "and other licenses," then the banks, railroad companies, and express companies are also comprised in these words; and if all these large companies could be compelled to take out licenses, then the Provincial Legislature would have power to impose stamp duties on promissory notes, bank shares, cheques, and on every ticket issued by a railway company,

and on bills of lading signed by express companies. The Legislature would also have the power to compel notaries to take out licenses, and to impose a stamp duty on each and every deed they might pass. In fact, the power to tax indirectly would be unlimited. With the words "and other licenses" a stamp duty could be imposed on all things that might be made, subject to the taking out of a license.

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The revenues of the Local Legislatures could thereby be largely increased, and direct taxation would no doubt be avoided for a long time.

Can the Constitution have intended this? I do not think so; and in support of my opinion I will take the liberty of referring to the history of our Constitution, and of citing two or three extracts from the discussion which took place in our Parliament at the time of the debates on Confederation. It is well known that although the B. N. A. Act is an Imperial statute, it was on the Quebec resolutions previously adopted that the Act was founded, and that the important debates on the project took place in Canada. It is true that numerous alterations were made in England to the resolutions passed by the Canadian Legislature; but when I compare the resolutions with the Imperial statute, I find that the clauses having reference to the distribution of legislative powers between the Parliament of the Dominion and the Local Legislatures were not materially altered; so that what was said in the Canadian Parliament on these clauses may be considered as applicable to the sections of the Imperial Act now under consideration.

At page 94 of the Debates on Confederation, one of the speakers, after having spoken in reference to the subsidy to be given by the Federal Government to the Local Governments, adds: "If this, from any cause, does not suffice, the Local Governments must supply all deficiencies from direct tax on their own localities." And at pp. 384, 385, another speaker seems also to be clearly of opinion that the sources of revenue for the Province of Quebec were to be, under Confederation, those which existed at that time and previously, and that the only mode of increasing the revenues would be by direct taxation. At pp. 67-69, a third speaker uses very clear and unambiguous language on this point. The fact that this person was at the time Minister of Finance for Canada, adds very much weight to his remarks, when the question was to provide for the financial position of the Provinces under the proposed scheme. I will give the following extracts:—

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"I now propose, Sir, to refer to the means which will be at the disposal of the several Local Governments to enable them to administer the various matters of public policy which it is proposed to entrust to them.

"It will be observed that in the plan proposed there are certain sources of local revenue reserved to the Local Governments, arising from territorial domain, lands, mines, etc., etc. In the case of Canada, a large sum will be received from these resources, but it may be that some of them, such as the Municipal Loan Fund, will become exhausted in the course of time. We may, however, place just confidence in the development of our resources, and repose in the belief that we shall find in our territorial domain, our valuable mines, and our fertile lands, additional sources of revenue far beyond the requirements of the public service. If, nevertheless, the local revenues become inadequate, it will be necessary for the Local Government to have resort to direct taxation."

It is evident that the speaker was not of opinion that Local Legislatures would be able to dispense with direct taxation by means of license duties. Further on he says: "The House must now, sir, consider the means whereby these local expenditures have to be met. I have already explained that in the case of Canada, and also in that of the Lower Provinces, certain sources of revenue are set aside as being of a purely local character, and available to meet the local expenditure; but I have been obliged, in my explanations with regard to Canada, to advert to the fact that it is contemplated to give a subsidy of eighty cents per head to each of the Provinces. In transferring to the General Government all the large sources of revenue, and in placing in their hands, with a single exception—that of direct taxation—all the means whereby the industry of the people may be made to contribute to the wants of the State, it must be evident to everyone that some portion of the resources thus placed at the disposal of the General Government must, in some form or other, be available to supply the hiatus that would otherwise take place between the sources of local revenue and the demands of local expenditure."

By stating that "all the large sources of revenue, with the exception of direct taxation, were to be transferred to the General Government," the speaker could not have had the intention of giving to the Local Legislatures the larger powers of licensing which the Quebec Legislature claims to have in the present case.

No doubt the Imperial statute must, as any other statute, be

construed by itself, and the opinions I have referred to are not legal authorities. But can we not look at them in order to interpret this statute? And it is to be borne in mind, in referring to the history of our Constitution, that these persons whose opinions I have cited, formed part of the preliminary conference when the resolutions on Confederation were framed. Can it be said that a commentary on a law by the author of that law should have no weight?

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In France, do we not continually see commentators and text-writers, in order to construe the text of the Code Napoléon, refer to the speeches made by Cambacères, Freiluard, Bigot de Preameneu, Comte de Portales, and others, made during the discussion of the subject in the Council of State, at the Tribune, and in the Legislative Assembly?

I therefore come to the conclusion that the Local Legislatures, under the Imperial statute, have only authority to impose an indirect tax on shop, saloon, tavern, auctioneer, and other licenses *ejusdem generis*, and that Insurance Companies, not being *ejusdem generis*, as shop, etc., cannot be subjected to an indirect tax imposed by Local Legislatures.

So far, I have not taken into account the commercial character of Insurance Companies. I have tried to find in the Imperial Act a power given to the Local Legislatures, by way of exception, to impose indirect taxes by license duties on any industry (commercial or non-commercial), occupation, trade, profession, other than on "shop, saloon, tavern, auctioneer," and others of the same kind, *ejusdem generis*, but I have not found such a power. It would not be necessary for me to add anything, for, as I have already remarked, I am of opinion that, as the power has not been given to the Local Legislatures, it comes within the legislative authority of the Federal Parliament, although, by section 91, it may not have been particularly and specially given. But I will go one step further, and, taking into consideration that the respondents' company (and all similar companies) is a commercial company, and that its contracts are entirely of a commercial character (C. O. 24, 70), I find that, by the Imperial statute, these companies and such companies, in express and clear terms, are subject to the legislative authority and are under the exclusive control of the Federal Parliament. Sub-section 2 of the 91st section enacts, that the Federal Parliament shall have power to make laws relating to "the regulation of trade and commerce." The Insurance Companies being



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commercial companies, are, therefore, under the power of the Federal Parliament. It has not been contended by the Attorney-General of the Province of Quebec that the Federal Parliament had not legislative authority over these companies, but it was apparently urged that the Local Legislatures had a concurrent power, or rather, if I am not mistaken, it was admitted that the Local Legislatures could not regulate these companies, but that they had the power to oblige them to take out a license for the purpose of raising a revenue, and this was not to *regulate* them; and that in the present case it had not been the intention to *regulate* the trade of these companies, but the intention of the Legislature of Quebec was to raise a revenue. I am ready to admit that the intention of the Legislature was to raise a revenue, but is not this legislation virtually "a regulation of trade and commerce," and in one of its most extensive and largest branches? First, a duty is imposed on the companies to take out a license, and to be continually doing business under license. What is a license? It is a permit—leave granted. What is the origin of the word? Undoubtedly *licet*, *licere*—to grant leave. Now, in order to grant leave, you must have power to prohibit. He who can grant leave must, first of all, have authority to prohibit. Now, I am certain the Legislature of Quebec will not contend that they have power to prohibit or prevent Insurance Companies from doing business in the Province. It is true this legislation does not prohibit them, but it has imposed upon them certain conditions. The law says: "Before you can do any business in our Province you must first obtain our leave." Can it be said this is not regulating? The law also says: "If you do not comply with certain formalities, your policies and your receipts will be null and void." Is this not regulating them? In fact, is it not assuming the power to prevent them from doing business?

The defendant company has obtained from the Federal Government the license—the leave—to do business in the Province of Quebec. In order to get the license, they have deposited \$150,000, and they have paid and pay, jointly with other companies, an annual tax to the Dominion of \$8,000, and have complied with all the provisions of the Dominion statute, 38 Vic., c. 20. But it is contended that all this does not even give it authority to issue a single policy. The Province of Quebec steps in and says: "If, under your license from Ottawa, you issue a single policy or receipt, we enact they shall be null, unless you submit to the conditions we

impose upon you." They say, "We might, notwithstanding your license from Ottawa, expel you from the Province of Quebec, and prevent you from carrying on your trade, but we will permit you, but on these conditions." I do not think that the Province of Quebec has such powers—first, because they are not given by the 92nd section of the Imperial statute, and, consequently, belong to the Federal Parliament; and secondly, because they are given specifically, by the 91st section, under the words "Regulation of trade and commerce," to the central power. No doubt, as has been very properly remarked by the counsel representing the Attorney-General, a literal interpretation of these two sections would make them contradictory on some points.

The 91st section declares that the Federal Government shall have power to tax in every possible mode, and this includes direct taxation. The 92nd section declares that the Local Legislature has exclusively the power of direct taxation. A literal interpretation of these two sections would make them contradictory. It has been stated somewhere that, in order to reconcile these two sections, the word "exclusively" must be construed as referring to the Imperial power. I do not concur in this view. The word was taken from the resolutions on Confederation sent from Canada, and it was certainly not the intention to refer them to the Imperial power. I prefer to admit that there is a contradiction in the letter of the statute, and construe the sections as giving the power of direct taxation, both to the central and local power, and this is in accordance with the well-known rule, "Where a general intention is expressed in a statute, and the Act also expresses a particular intention incompatible with the general intention, the particular intention shall be considered as an exception:" per Best, C.J., in *Churchill v. Crease*. (1)

It is true that, by the 91st section, the Federal Parliament has exclusively the power to tax in every mode, but section 92 gives specifically to the Local Legislatures the power of direct taxation. Then, according to the above rule, direct taxation must be considered by section 92 as being excepted from the monopoly given in general terms by the 91st section to the Federal Parliament. The same rule is applicable to the construction of the other paragraphs of these two sections. Thus, although by the 91st section the Federal Parliament has the exclusive power of taxing in every

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mode, and of regulating trade and commerce—shop, saloon, tavern, auctioneer licenses, and other licenses of the same kind, come within the jurisdiction of the Local Legislatures, and that because the power is given specifically by the 92nd section, and *vice versa*. Although the 92nd section gives the power of direct taxation and of indirect taxation by means of the licenses just mentioned, the Federal Parliament has also the power of direct taxation and indirect taxation by means of said licenses, because the 91st section gives them power specifically of imposing all kinds of taxes, which is one of the essential elements of sovereignty, and at the same time giving an exclusive control over the regulation of trade and commerce. The concurrent legislative authority over these subject-matters by the Federal Parliament and the Local Legislatures can only exist as to direct taxation and the granting of “shop, saloon, tavern, auctioneer, and other licenses,” *ejusdem generis*. It is not, however, necessary for me to consider in this cause the different questions which may arise from the concurrent powers given to these legislative bodies, as I am of opinion, for the reasons I have before given, that the licenses imposed on the Insurance Companies cannot be said to be a direct tax, and are not comprised in the words “shop, saloon, tavern, auctioneer and other licenses.”

It was stated on the argument that municipal taxes are in a somewhat similar position to these. Without wishing to express an opinion in one sense or the other as to the constitutionality of any legislation relating to the municipal system, I will say that it is quite possible such legislation would come within a different class of subject-matters, and within certain other sections of the Imperial statute which I have had occasion to refer to. I allude to the 129th section, which declares that the existing laws before Confederation in each Province shall continue to remain in force, and gives power to the Dominion Parliament and to the Local Legislatures to repeal, alter or modify them according to their respective jurisdiction, as well as by paragraph 8 of the 92nd section, which puts the municipal system under the control of the Local Legislatures. But it is not necessary for us to express any opinion on this portion of the Imperial statute.

By this suit the Attorney-General for the Province of Quebec claims from the defendant company a penalty of one hundred and fifty dollars for issuing three insurance policies without having affixed to them the stamps required by the statute passed by the Legislature of the Province of Quebec. The Superior Court has

decided that this Act, passed by the Legislature of Quebec, is unconstitutional, and has dismissed the plaintiff's action. This judgment ought to be confirmed, and is confirmed.

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DORION, C. J. :—

I concur in the judgment on the following grounds :

The Local Legislature has the right to impose direct taxes only.

It has also power to grant licenses as a means of raising revenue for Provincial and municipal purposes.

Now, the charge imposed upon licenses is clearly an indirect tax. It is not imposed on the insurance itself, but upon the business which is doing—that is, the insurer is obliged to place a stamp on every policy issued, according to the amount of such policy. It is as much an indirect tax as the taxes of excise or of customs. They are not intended to be paid by the insurer, but are to be paid by the insured, whoever they may be.

This case must therefore come under the provisions allowing the Local Legislatures to grant licenses. I am not prepared to state that the Local Legislatures have not the right to grant licenses to insurance companies, to banks, &c. ; but if the Legislatures have that right, they must do it in such form as not to violate one of the restrictions of the Confederation Act, which does not authorize them to impose indirect taxes.

The Local Legislatures are authorized to grant licenses and to raise revenue on such licenses as were usually granted. Now, it so happens that there was not, at the time the Confederation Act was passed, a single license granted on which the payment or fee was laid on the amount of business done—at least, if there was, I am not aware of any. All licenses granted were for a fixed sum.

This view was carried so far that in the Act to regulate the business of auctioneers, each auctioneer has to pay a fixed sum, which is described as the price of the license, and another sum of one per cent. on the price of the goods sold, this last sum to be added to the price of the goods sold.

The duty imposed by the Local Legislature is not therefore a license fee, such as was known in this country at the time of the Confederation Act. I therefore find that although in form a license appears to have been granted, in substance it is an indirect tax which has been imposed. It is an evasion of the Act from which the Local Legislature derives its powers. The Local Legislature, no more than private individuals, cannot act as it were in *fraud of the*

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law, to use a technical term—that is, to do by indirect means what it cannot effect directly.

As to the question whether the Local Legislature has a right to force an Insurance Company to take a license, I am not called upon to express an opinion, and there is great difficulty in the question. In the few cases that have come before courts of justice, the greatest diversity of opinion has prevailed. In the Queen's Bench in Ontario it has been held that a license of \$50 on business was *ultra vires* and unconstitutional, while the Court of Appeal reversed the judgment, and declared the license constitutional. (1) In New Brunswick the Courts decided according to the view taken by the Queen's Bench of Ontario.

The rule of interpretation generally adopted by the authors and by the jurisprudence is that when in a provision of law general words follow special words applying to special cases, the general words extend the provision to similar cases only *ejusdem generis* with those specially mentioned. But this Act seems to escape from the ordinary rules of construction applicable to statutes generally. The Confederation Act must be interpreted according to the real or presumed intention of the Imperial Parliament, of the Legislatures of the several Provinces, and this intention must be gathered from the circumstances existing in the several Provinces at the time of the Confederation. Now, I find that at that time it was within the power of the Legislatures to authorize municipal corporations to issue licenses to or to tax Insurance Companies and other commercial bodies or corporations, and I find that this power has been continued by the 129th sec. of the B. N. A. Act. It would be very singular that the Provincial Legislatures should have the power to authorize municipalities to raise revenue from Insurance Companies, while it would have no power to raise such revenue for Provincial purposes, while the sub-section 9 of sec. 92 of the B. N. A. Act speaks of raising revenue by means of licenses, as well for Provincial as municipal purposes. On the other hand, it is urged with considerable force that a license means a permit, and if they have a right to permit, this implies a right to prohibit, and, therefore, to regulate a matter affecting the trade of the country, which the Provincial Legislatures undoubtedly have not. But I have already said we are not at present called upon to give an

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[ (1) See *Regina v. Taylor*, 36 U. C. Q. B. 217; *Severn v. The Queen*, 2 Can. S. C. R. 77.]

opinion on this point, which is undoubtedly of the greatest difficulty. For the reasons stated, I confine myself to saying that the duty imposed upon Insurance Companies is an indirect tax, which the Local Legislature had no authority to impose.

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MONK and TESSIER, JJ., concurred in affirming the judgment of the court below.

*JUDGMENT OF SUPERIOR COURT from which there was the Appeal to the Court of Queen's Bench, in which the preceding judgments were given affirming this judgment of Mr. Justice Torrance.*

[Reported 21 L. C. J. 77.]

TORRANCE, J. :—

The facts of this case have been admitted—namely, the issue of three policies of insurance by the defendants, in contravention of the provisions of the Provincial Statute; the issue of a license by the Dominion Government to the defendants, under the 81 Vict. c. 48, implying the deposit of \$150,000 in securities of the Dominion. The naked question to decide is whether the Provincial Statute, 39 Vict. c. 7, is beyond the power of the Provincial Legislature. It becomes every tribunal to realize the delicacy of the question. To use the language of Chief Justice Marshall in considering a similar question in the United States, "In the case now to be determined, the defendants contest the validity of an Act which has been passed by the Legislature of the (State) Province. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the Government of the Union and of its members, as marked in the Constitution, are to be discussed; and an opinion given which may essentially influence the great operations of the Government. No tribunal can approach such a question without a deep sense of its importance."

At the outset we may say that the license or stamp required by the Provincial Legislature from the Insurance Companies is an indirect tax. Smith, in his "Wealth of Nations," Book V., chap. 2, Brande in his "Encyclopædia of Science of Taxation," and other works referred to by counsel at the argument, shew this as well as the very nature of the tax. Let us turn next to the clauses of the Confederation Act. It is only necessary to consider the 91st and 92nd clauses. Clause 91 says: "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of

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Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

“2. The regulation of trade and commerce.

“3. The raising of money by any mode or system of taxation.

“29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

“And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.”

“Exclusive powers of Provincial Legislatures—92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

“2. Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes.

“9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local or municipal purposes.”

The counsel for the Province have laid great stress upon this last clause, as authorizing the taxation in question. On the other hand, the defendants find an argument for their immunity in the exclusive powers given to the Dominion Legislature in matters of trade and commerce. Reference has been made to the decisions of the Supreme Court of the United States of America, arising out of the occasional conflicts there between Federal and State rights. It will be remembered that when the civil war began between North and South in 1861, there was much discussion as to the respective rights of the General and State Legislatures, and it was generally conceded that the Constitution only gave to the Federal Legislature the powers which had been renounced by the States. This had been understood long before. De Tocqueville, in his celebrated

work on "Democracy in America," chap. 8, says: "The attributes of the Federal Government were carefully defined, and all that was not included among them was declared to remain to the Governments of the several States. Thus the Government of the States remained the rule, and that of the Confederation was the exception."

Now, I think I am safe in saying that the spirit of our Constitution is quite different. Its framers had before them the melancholy warfare which had so long desolated so large a portion of this continent, and determined that there should be no question as to the supremacy of the General Government, or the subordinate position of our Provinces. It was intended that the General Legislature should be strong—far stronger than the Federal Legislature of the United States in relation to the State Governments.

Accordingly we find, in the clauses of our Constitution already recited, that the Dominion Legislature makes laws in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces; "and for greater certainty, but not so as to restrict the generality of the foregoing terms," it was declared that (notwithstanding anything in the Act) the exclusive legislative authority of Canada extends to all matters coming within the classes of subjects enumerated, *inter alia*, "Trade and commerce." "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Reference has been made to the decisions of the Supreme Court of the United States on kindred subjects: "Congress is vested with power to regulate commerce; but this power is not so far exclusive as to prevent regulations by the States also, when they do not conflict with those established by Congress. . . . Where Congress has not acted at all upon the subject, the State taxation cannot be invalid on this ground; but where national regulations exist, under which rights are established or privileges given, the State can impose no burdens which shall in effect make the enjoyment of those rights and privileges contingent upon the payment of tribute to the State."—Cooley on Constitutional Limitations, p. 486.

"From the paramount authority of the General Government, the States are restrained, without any express prohibition, from

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any exercise of their taxing power, which, in its nature, is incompatible with or repugnant to the constitutional laws of the Union. . . . They have no power, by taxation or otherwise, to retard, impede, burden, or in any manner to control the operations of constitutional laws enacted by Congress to carry into execution any of the powers vested in the Federal Government."—Duer's Constitutional Jurisprudence, p. 384.

In *McCulloch v. Maryland* (1), Chief Justice Marshall said: "That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the Government of the Union; that it is to be concurrently exercised by the two Governments, are truths which have never been denied. But such is the paramount character of the Constitution that its capacity to withdraw any subject from the action of even this power is admitted . . . . the same paramount character would seem to restrain . . . . a State from such other exercise of this power as is in its nature incompatible with and repugnant to the constitutional laws of the Union. A law absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used. . . . The claim has been sustained on a principle which so entirely pervades the Constitution . . . . as to be incapable of being separated from it without rending it into shreds. This great principle is, that the Constitution and the laws made in pursuance thereof are supreme. . . . From this . . . . other propositions are deduced. . . . These are: 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and to preserve. 3. That, where this repugnancy exists, that authority which is supreme must control, not yield to . . . . that over which it is supreme."

I think we can make an application of these authorities to the case now under consideration. I think we would be safe in holding that, under the Constitution of the United States, if the Federal Congress had legislated respecting Insurance Companies as the Dominion Legislature has done respecting them, under 31 Vict. c. 48, the State would not be allowed to impose another tax. But our Dominion Legislature has greater powers in that it has exclusive control over trade and commerce.

I do not see that the words of the Confederation Act, section 92, sub-section 9, "shop, saloon, tavern, auctioneer, and other licenses," remove the difficulty in the way of plaintiff's demand. The clause does not touch upon insurances. We are therefore justified in concluding that the Act of the Province of Quebec, 39 Vict. c. 7, has infringed upon the exclusive powers of the Dominion Legislature, and, therefore, that its enactments should be disregarded in this matter.

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## [PRIVY COUNCIL.]

PIERRE VINCENT VALIN ..... *Appellant*,

AND

JEAN LANGLOIS ..... *Respondent*.*In re Petition of Pierre Vincent Valin.**On appeal from the Supreme Court of Canada.*[*Reported 5 App. Cas. 115.*]

The Parliament of the Dominion of Canada has power to impose new duties upon existing Provincial Courts, and to give them powers as to matters coming within the classes of subjects over which the Dominion Parliament has jurisdiction. Consequently the Dominion Controverted Elections Act of 1874 (Canadian Stat. 37 Vict. c. 10), which confers upon the Provincial Courts jurisdiction with respect to elections to the Dominion House of Commons, is valid.

Special leave refused to appeal from two concurrent judgments of the Courts in Canada, affirming the competency and validity of the said Act of 1874; it appearing to the Judicial Committee of the Privy Council that there was no substantial question requiring to be determined, none of their Lordships having any doubt of the soundness of the judgments, though several judges of the first instance had held the Act to be invalid.

This was a petition of special leave to appeal from a judgment of the Supreme Court of Canada† (Oct. 28, 1879), affirming a judgment of the Chief Justice of the Superior Court of Quebec (Jan. 1879), dismissing certain preliminary objections of the Petitioner, to an election petition filed against him by the Respondent. The election petition prayed that Valin's election to a seat in the

\* Present:—Lord Selborne, Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

† *Post*, p. 167.

Canadian House of Commons for Montmorency, might be declared null and void, for bribery practised by himself, and his agents, to his knowledge, and with his consent. The objections were that the Superior Court of the Province of Quebec had no jurisdiction to entertain an election petition.

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Mr. Benjamin, Q.C. (Mr. Gainsford Bruce with him), in support of the petition, urged that the appeal raised a question of very great importance, and one, which had given rise to much conflict of opinion, viz.:—as to the validity of Act 37 Vict. c. 10. Though the judges in this case were unanimous in upholding its validity, yet a different view has been taken by other judges in other Provinces. In the Province of Quebec it was stated that all the contestations had been suspended, the judges awaiting the decision of the Privy Council before proceeding any further. With regard to the jurisdiction of the Superior Court in this case, reference was made to the B. N. A. Act, 30 Vict. c. 3, ss. 41, 91, 92, sub-s. 14, 101, and to 36 Vict. c. 28, which makes provision for the trial of election petitions, and was repealed by 37 Vict. c. 10. See ss. 3, 33, 34 and 35, of the last mentioned Act. See also 38 Vict. c. 11, ss. 47, 48. He submitted that the Parliament of Canada had, under the Imperial Act of 1867, no power to make laws in relation to the administration of justice in the Province of Quebec, or to the constitution of any Provincial Courts, or to procedure in those Courts. Consequently it had no power to confer any new jurisdiction upon the Superior Court, or to affect its procedure, or to impose new duties on its judges; and, therefore, the Canadian Act of 1874 (37 Vict. c. 10) was *ultra vires* and inoperative. The Act of 1875, providing for appeals from decisions of the Superior Court, under the Act of 1874, would stand or fall with the latter Act.

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The judgment of their Lordships was delivered by  
LORD SELBORNE :—

Their Lordships have carefully considered the able argument which they have heard from Mr. Benjamin, and they feel glad that so full an argument has been offered to them, because there can be no doubt that the matter is one of great importance. The petition is to obtain leave to appeal from two concurrent judgments of the Court of first instance, and of the Court of Appeal affirming the competency and validity of an Act of the Dominion Legislature of Canada. Nothing can be of more importance, certainly, than a question of that nature, and the subject matter also, being the mode of determining election petitions in cases of controverted elections to seats in the Parliament of Canada, is beyond all doubt of the greatest general importance. It, therefore, would have been very unsatisfactory to their Lordships to be obliged to dispose of such an application without, at least, having had the grounds of it very fully presented to them. That has been done, and I think I may venture to say for their Lordships generally, that they very much doubt whether, if there had been an appeal and counsel present on both sides, the grounds on which an appeal would have been supported, or might have been supported, could have been better presented to their Lordships than they have been upon the present occasion by Mr. Benjamin.

In that state of the case their Lordships must remember on what principles an application of this sort should be granted or refused. It has been rendered necessary, by the legislation which has taken place in the colony, to make a special application to the Crown in such a case for leave to appeal; and their Lordships have decided on a former occasion that a special application of that kind should not be lightly or very easily granted;

that it is necessary to shew both that the matter is one of importance, and also that there is really a substantial question to be determined. It has been already said that their Lordships have no doubt about the importance of this question; but the consideration of its importance and the nature of the question tell both ways. On the one hand those considerations would undoubtedly make it right to permit an appeal, if it were shewn to their Lordships, *primâ facie* at all events, that there was a serious and substantial question requiring to be determined. On the other hand, the same considerations make it unfit and inexpedient to throw doubt upon a great question of Constitutional Law in Canada, and upon a decision in the Court of Appeal there, unless their Lordships are satisfied that there is, *primâ facie*, a serious and a substantial question, requiring to be determined. Their Lordships are not satisfied in this case that there is any such question, inasmuch as they entertain no doubt that the decisions of the Lower Courts were correct. It is not to be presumed that the Legislature of the Dominion has exceeded its powers, unless upon grounds really of a serious character. In the present case their Lordships find that the subject-matter of this controversy, that is, the determination of the way in which questions of this nature are to be decided, as to the validity of the returns of members to the Canadian Parliament is, beyond all doubt, placed within the authority and the legislative power of the Dominion Parliament by the 41st section of the Act of 1867, to which reference has been made; upon that point no controversy is raised. The controversy is solely whether the power which that Parliament possesses of making provision for the mode of determining such questions has been competently or incompetently exercised. The only ground on which it is alleged to have been incompetently exercised

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is that by the 91st and 92nd clauses of the Act of 1867, which distribute legislative powers between the Provincial and the Dominion Legislatures, the Dominion Parliament is excluded from the power of legislating on any matters coming within those classes of subjects which are assigned exclusively to the Legislatures of the Provinces. One of those classes of subjects is defined in these words, by the 14th sub-section of the 92nd clause:—"The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including procedure in civil matters in those Courts." The argument, and the sole argument, which has been offered to their Lordships to induce them to come to the conclusion that there is here a serious question to be determined, is that the Act of 1874, the validity of which is challenged, contravenes that particular provision of the 92nd section, which exclusively assigns to the Provincial Legislatures the power of legislating for the administration of justice in the Provinces, including the constitution, maintenance and organization of Provincial Courts of Civil and Criminal Jurisdiction, and including procedure in civil (not in criminal) matters in those Courts. Now, if their Lordships had for the first time, and without any assistance from anything which has taken place in the colony, to apply their minds to that matter, and even if the 41st section were not in the Act, it would not be quite plain to them that the transfer of the jurisdiction to determine upon the right to seats in the Canadian Legislature—a thing which had always been done, not by Courts of Justice, but otherwise—would come within the natural import of those general words:—"The administration of justice in the Province, and the constitution, maintenance and organization of Provincial Courts, and procedure in civil matters in those

Courts." But one thing, at least, is clear, that those words do not point expressly or by any necessary implication to the particular subject of election petitions; and when we find in the same Act another clause which deals expressly with those petitions there is not the smallest difficulty in taking the two clauses together and placing upon them both a consistent construction. That other clause, the 41st, expressly says that the old mode of determining this class of questions was to continue until the Parliament of Canada should otherwise provide. It was, therefore, the Parliament of Canada which was otherwise to provide. It did otherwise provide by the Act of 1873, which Act it afterwards altered, and then passed the Act now in question. So far it would appear to their Lordships very difficult to suggest any ground upon which the competency of the Parliament of Canada so to legislate, could be called in question; but the ground which is suggested is this, that it has seemed fit to the Parliament of Canada to confer the jurisdiction necessary for the trial of election petitions upon Courts of ordinary jurisdiction in the Provinces; and it is said, that although the Parliament of Canada might have provided in any other manner for those trials, and might have created any new Courts for this purpose, it could not commit the exercise of such a new jurisdiction to any existing Provincial Court. After all their Lordships have heard from Mr. Benjamin, they are at a loss to follow that argument, even supposing that this were not in truth and in substance the creation of a new Court. If the subject-matter is within the jurisdiction of the Dominion Parliament, it is not within the jurisdiction of the Provincial Parliament; and that which is excluded by the 91st section from the jurisdiction of the Dominion Parliament is not anything else than matters coming within the classes of subjects assigned exclusively to the

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Legislatures of the Provinces. The only material class of subjects relates to the administration of justice in the Provinces, which, read with the 41st section, cannot be reasonably taken to have anything to do with election petitions. There is, therefore, nothing here to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing Provincial Courts, or to give them new powers, as to matters which do not come within the classes of subjects assigned exclusively to the Legislatures of the Provinces; but in addition to that, it appears that by the Act of 1873, which, even by those judges, who are said to have disputed the competency of the Act of 1874, is admitted to have been competent to the Dominion Parliament, what appears to their Lordships to be exactly the same thing in substance, and not so very different even in form, was done. It was intended that when a Court of Appeal should be constituted for the Dominion, a judge of that Court of Appeal should be the judge in the first instance of election petitions, and three judges of the same Court should have power to sit in appeal from any judgment of a single judge; but it was necessary also to provide for the interval between the passing of the Act and the constitution of such a Court of Appeal; and that Act of 1873 provided that in the meantime the judges of the existing Provincial Courts should exercise, under regulations contained in it, the same jurisdiction. It did not, indeed, say the Courts; it said the judges of the Courts; and that is really in their Lordships' view the sole difference, for this purpose, between the Act of 1873 and the Act of 1874. The Act of 1874 in substance does the same thing, except that in the definition clause it uses this language:—"The expression 'the Court' as respects elections in the several Provinces hereinafter mentioned, respectively, shall mean the Courts hereinafter men-

tioned, or any judges thereof;" and then it mentions by their known names the existing Courts of the different Provinces. When their Lordships go on to look at the provisions which follow in the Act, it is clear not only that a new jurisdiction is conferred upon those Courts, but that everything necessary for the exercise of that new jurisdiction is provided for, even the power to take evidence; it is said that a single judge in rotation, and not the entire Court, is to exercise that jurisdiction; and in the 48th section,—“That on the trial of an election petition, and in other proceedings under this Act, the judge shall, subject to the provisions of this Act, have the same powers of jurisdiction and authority as a judge of one of the Superior Courts of Law or Equity for the Province in which such election is held, sitting in term or proceeding at the trial of an ordinary civil suit, and the Court held by him in such trial, shall be a Court of Record.” Words could not be more plain than those to create this as a new Court of Record, and not the old Court with some superadded jurisdiction to be exercised as if it had been part of its old jurisdiction. And all that is said as to the employment of the same officers, or of any other machinery of the Court for certain purposes defined by reference to the existing procedure of the Courts,—shews that the Dominion Legislature was throughout dealing with this as a new jurisdiction created by itself; although in many respects adopting, as it was convenient that it should adopt, existing machinery. Therefore their Lordships see nothing but a nominal, a verbal, and an unsubstantial distinction between this latter Act, as to its principle, and those provisions of the former Act which all the judges of all the Courts in Canada, apparently without difficulty, held to be lawful and constitutional.

Then their Lordships are told that some of the judges

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of the Courts of first instance have thought there was more of substance in the distinction than there appears to their Lordships to be, and have declined to exercise this jurisdiction. It has been said that five judges have been of that opinion. On the other hand, two judges of first instance—I think both in the Province of Quebec, the Chief Justice, in the present case, and in another case, Mr. Justice Caron, a judge whose experience on the Canadian Bench has been long, and whose reputation is high,—have been of opinion that this law was perfectly within the competency of the Dominion Legislature, and they could see nothing in the distinction taken between the present law, as to its principle, and the former. And now the question has gone to the Court of Appeal, the Supreme Court of Canada, which, constituted as a full Court of four judges, has unanimously been of that opinion; and nothing has been stated to their Lordships, even from those sources of information with which Mr. Benjamin has been supplied, and which he has very properly communicated to their Lordships; nothing has been stated to lead their Lordships at all to apprehend that there is any real probability that any judge of the inferior Courts will hereafter dispute their obligation to follow the ruling of the Supreme Court, unless and until it shall be reversed by Her Majesty in Council; nothing has been said from which their Lordships can infer that any Provincial Legislature is likely to offer any opposition to such a ruling on this question as has taken place by the Court of Appeal, unless, as has been said, it should at any future time be reversed by Her Majesty in Council.

Under these circumstances their Lordships are not persuaded that there is any reason to apprehend difficulty or disturbance from leaving untouched the decision of the Court of Appeal. Their Lordships are not convinced that there is any reason to expect that any of the judges

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of the Court below will act otherwise than in due subordination to the appellate jurisdiction, or refuse to follow the law as laid down by it. If indeed the able arguments which have been offered had produced in the minds of any of their Lordships any doubt of the soundness of the decision of the Court of Appeal, their Lordships would have felt it their duty to advise Her Majesty to grant the leave which is now asked for ; but, on the contrary, the result of the whole argument has been to leave their Lordships under the impression that there is here no substantial question at all to be determined, and that it would be much more likely to unsettle the minds of Her Majesty's subjects in the Dominion, and to disturb in an inconvenient manner the legislative and other proceedings there, if they were to grant the prayer of this petition, and so throw a doubt on the validity of the decision of the Court of Appeal below, than if they were to advise Her Majesty to refuse it.

Under these circumstances their Lordships feel it their duty humbly to advise Her Majesty that this leave to appeal should not be granted, and that the petition should be dismissed.

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JUDGMENTS IN SUPREME COURT OF CANADA.

[*Reported 3 Can. S. C. R. 1.*]

THE CHIEF JUSTICE :—

This is an appeal from the judgment of Mr. Chief Justice Meredith, dismissing the preliminary objections of the appellant, and declaring "The Dominion Controverted Elections Act, 1874," to be not *ultra vires* of the Dominion Parliament ; and the correctness of this determination is the only question now in controversy.

This, if not the most important, is one of the most important questions that can come before this Court, inasmuch as it involves, in an eminent degree, the respective legislative rights and powers of the Dominion Parliament and the Local Legislatures, and its logical conclusion and effect must extend far beyond the question

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now at issue. In view of the great diversity of judicial opinion that has characterized the decisions of the Provincial tribunals in some Provinces, and the judges in all, while it would seem to justify the wisdom of the Dominion Parliament in providing for the establishment of a Court of Appeal such as this, where such diversity shall be considered and an authoritative declaration of the law be enunciated, so it enhances the responsibility of those called on in the midst of such conflict of opinion to declare authoritatively the principles by which both Federal and local legislation are governed.

Previously to Confederation, the Governor or Lieutenant-Governor, Council and Assembly in the respective Provinces of Canada, Nova Scotia, and New Brunswick, formed a legislative body of the Province, subordinate, indeed, to the Parliament of the mother country, and subject to its control, but, with this restriction, having the same power to make laws binding within the Province that the Imperial Parliament has in the mother country; and the propriety and necessity of such enactments were within the competency of the Legislature alone to determine. As the House of Commons in England exercised sole jurisdiction over all matters connected with controverted elections, except so far as they may have restrained themselves by statutory restrictions, the several Houses of Assembly always claimed and exercised in like manner the exclusive right to deal with, and be the sole judges of, election matters, unless restrained in like manner, and this claim, or the exercise of it, I have never heard disputed; on the contrary, it is expressly recognized as existing in the Legislative Assemblies by the Privy Council in *Théberge v. Landry* (1). When the Provinces of Canada, Nova Scotia, and New Brunswick sought "to be federally united into one Dominion, under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom," it became absolutely necessary that there should be a distribution of legislative powers, and so we find the exclusive powers of the Provincial Legislatures very specially limited and defined, while legislative authority is given to the Parliament of Canada to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces; and for

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(1) 2 App. Cas. 102.

greater certainty, but not so as to restrict the generality of the foregoing terms, it is declared that, notwithstanding anything in the Act, the exclusive legislative authority of the Dominion of Canada shall extend to all matters coming within the classes of subjects next hereinafter enumerated. It will be observed, that of the classes of subjects thus enumerated, either in respect to the powers of the Provincial Legislatures, or those of the Parliament of Canada, there is not the slightest allusion, direct or indirect, to the rights and privileges of Parliament, or of the Local Legislatures, or to the election of Members of Parliament, or of the Houses of Assembly, or the trial of controverted elections, or proceedings incident thereto. The reason of this is very easily found in the statute, and is simply that, before these specific powers of legislation were conferred on Parliament and on the Local Legislatures, all matters connected with the constitution of Parliament and the Provincial Constitutions had been duly provided for, separate and distinct from the distribution of legislative powers, and, of course, overriding the powers so distributed; for, until Parliament and the Local Legislatures were duly constituted, no legislative powers, if conferred, could be exercised.

Thus we find that, immediately after declaring that there shall be one Parliament of Canada, consisting of the Queen, Senate, and the House of Commons, the Imperial Act provides for the privileges of those Houses in these terms:—

“The privileges, immunities and powers to be held, enjoyed and exercised by the Senate and by the House of Commons and by the Members thereof respectively, shall be such as are from time to time defined by the Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof.”

And, after declaring what the constitution of the House of Commons shall be, and defining the electoral districts of the four Provinces, it makes provision for the continuance of existing election laws, until the Parliament of Canada otherwise provides, in these words:—

“Until the Parliament of Canada otherwise provides, all laws in force in the several Provinces at the Union relative to the following matters, or any of them,—namely, the qualifications and disqualifications of persons to be elected or to sit or vote as Members of

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the House of Assembly or Legislative Assembly in the several Provinces, the voters at elections of such Members, the oaths to be taken by voters, the Returning Officers, their powers and duties, the proceedings at elections, the periods during which the elections may be continued, the trial of controverted elections and proceedings incident thereto, the vacating of seats of Members, and the execution of new writs in case of seats vacated otherwise than by dissolution,—shall respectively apply to elections of Members to serve in the House of Commons for the same several Provinces." (1)

And by the 31 Vict. cap. 23, it is enacted that :

"The Senate and the House of Commons respectively, and the Members thereof respectively, shall hold, enjoy and exercise such and the like privileges, immunities and powers as at the time of the passing of the B. N. A. Act, 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof, so far as the same are consistent with and not repugnant to the said Act. Such privileges, etc., shall be deemed part of the General and Public Law of Canada ; and it shall not be necessary to plead the same, but the same shall, in all Courts in Canada, and by and before all judges, be taken notice of judicially."

In England, as is well known, before 1770, controverted elections were tried and determined by the whole House of Commons, or, for a time, by special committees, and by committees of privileges and elections. This was succeeded by the Grenville Act, the principle of which was to select committees for the trial of election petitions by lot. This Act, in 1773, was made perpetual, but not without the expression of very strong opinions against the limitations imposed by it upon the privileges of Parliament. (2)

In 1839, an Act passed (Sir Robert Peel's Act) establishing a new system upon different principles, and it was not till 1868, after Confederation, that the jurisdiction of the House of Commons, in the trial of controverted elections, was transferred by statute to the courts of law. Very much the same course of procedure, up to and after the time of Confederation, prevailed in some if not all of the Provinces.

But in 1873 the Dominion Parliament passed an Act to make better provision respecting election petitions and matters relating

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(1) B. N. A. Act, sect. 41.

(2) 17 Par. Hist. 1071 ; Lord Campbell's Chancellors, Vol. VI. p. 98.

to controverted elections and Members of the House of Commons, and established Election Courts, the judges of which were to be judges of Supreme or Superior Courts of the Provinces, provided the Lieutenant-Governors of the Provinces respectively should, by order made by and with the advice and consent of the Executive Council thereof, have authorized and required such judges to perform the duties thereby assigned to them, the intervention of the Legislature not being required, or, apparently, deemed necessary. This Act was repealed by the 37 Vict. cap. 10, "An Act to make better provision for the trial of Controverted Elections of Members of the House of Commons, and respecting matters connected therewith." This last Act, it is now contended, is *ultra vires*. The constitutionality of the Act of 1873, though questioned, as I understand, by one judge in Quebec, is, I believe, admitted, by all those who now think the Act of 1874 *ultra vires*, to have been *intra vires*, of the Dominion Parliament.

In determining this question of *ultra vires*, too little consideration has, I think, been given to the constitution of the Dominion, by which the legislative power of the Local Assemblies is limited and confined to the subjects specifically assigned to them, while all other legislative powers, including what is specially assigned to the Dominion Parliament, is conferred on that Parliament; differing in this respect entirely from the constitution of the United States of America, under which the State Legislatures retained all the powers of legislation which were not expressly taken away. This distinction, in my opinion, renders inapplicable those American authorities, which appear to have had so much weight with some of the learned judges who have discussed this question. And, as a consequence, too much importance has, I humbly think, been attached to sect. 101, which provides for the establishment of any additional courts for the better administration of the laws of Canada, and to sub-sects. 13 and 14 of sect. 92, which vest in the Provincial Legislatures the exclusive powers as to property and civil rights in the Provinces, and the "administration of justice in the Provinces, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts."

The establishment of additional courts for the better administration of the laws of Canada was primarily, I think, intended to apply, when deemed necessary and expedient, rather to the general laws of the Dominion than to matters connected with the privileges,

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immunities and powers of the Senate and House of Commons, though, of course, those might, incidentally, if so provided, come within the jurisdiction of such tribunals; that the property and civil rights referred to were not all property and all civil rights, but that the terms "property and civil rights" must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion Parliament, of which the first two items in the enumeration of the classes of subjects to which the exclusive legislation of the Parliament of Canada extends are illustrations, viz. :—1. "The public debt and property;" 2. "The regulation of trade and commerce;" to say nothing of "beacons, buoys, light-houses," etc., "navigation and shipping," "bills of exchange and promissory notes," and many others directly affecting property and civil rights; that neither this, nor the right to organize Provincial Courts by the Provincial Legislatures, was intended in any way to interfere with, or give to such Provincial Legislatures, any right to restrict or limit the powers in other parts of the statute conferred on the Dominion Parliament; that the right to direct the procedure in civil matters in those courts had reference to the procedure in matters over which the Provincial Legislature had power to give those courts jurisdiction, and did not in any way interfere with or restrict the right and power of the Dominion Parliament to direct the mode of procedure to be adopted in cases over which it has jurisdiction, and where it was exclusively authorized and empowered to deal with the subject-matter, or take from the existing courts the duty of administering the laws of the land; and that the power of the Local Legislatures was to be subject to the general and special legislative powers of the Dominion Parliament. But while the legislative rights of the Local Legislatures are in this sense subordinate to the right of the Dominion Parliament, I think such latter right must be exercised, so far as may be, consistently with the right of the Local Legislatures; and, therefore, the Dominion Parliament would only have the right to interfere with property or civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.

It is, I think, to sect. 91, in reference to the legislative authority of the Parliament of Canada, and to sects. 18 and 41, conferring privileges on the Senate and House of Commons, and legislative power over the trial of controverted elections and proceedings

incident thereto, that we must look, to ascertain whether the Parliament of the Dominion, in enacting the 37 Vict. cap. 10, exceeded its powers, because, I think, all the other sections conferring legislative powers must be read as subordinate thereto, and because I cannot discover that any of the other provisions apply, or were intended to apply, to the particular subject-matter thus legislated on, and which, I think, it was intended should be alone dealt with by the Dominion Parliament in any manner it might deem most expedient for the peace, order and good government of Canada. I think that the B. N. A. Act vests in the Dominion Parliament plenary power of legislation, in no way limited or circumscribed, and as large, and of the same nature and extent, as the Parliament of Great Britain, by whom the power to legislate was conferred, itself had. The Parliament of Great Britain clearly intended to divest itself of all legislative power over this subject-matter, and it is equally clear, that what it so divested itself of it conferred wholly and exclusively on the Parliament of the Dominion.

The Parliament of Great Britain, with reference to the power and privileges of the Parliament of the Dominion of Canada, and with reference to the trial of controverted elections, has made the Parliament of the Dominion an independent and supreme Parliament, and given to it power to legislate on those subjects in like manner as the Parliament of England could itself legislate on them. It is a constitutional grant of privileges and powers which cannot be restricted or taken away except by the authority which conferred it, and any power given to the Local Legislatures must be subordinate thereto.

The case of the *Queen v. Burah* (1) enunciates a principle very applicable to this case. The marginal note is :

“Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the areas over which it is to extend.”

And Lord Selborne, delivering the judgment of the Privy Council, said :

“But their Lordships are of opinion that the doctrine of the majority of the court is erroneous, and that it rests upon a mis-

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taken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe those powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large and of the same nature as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done in legislation is within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

Whether, therefore, the Act of 1874 established a Dominion Election Court or not, I think the Parliament of the Dominion, in legislating on this matter, on which they alone in the Dominion could legislate, had a perfect right, if in their wisdom they deemed it expedient so to do, to confer on the Provincial Courts power and authority to deal with the subject-matter as Parliament should enact; that the legislation, being within the legislative power conferred on them by the Imperial Parliament, their enactments in reference thereto became the law of the land, which the Queen's Courts were bound to administer.

I am at a loss to discover how the conferring of this jurisdiction on the Judges of the Supreme and Superior Courts, and on those Courts, in any way interferes with or affects, directly or indirectly, the autonomy of the Provinces, or the right of the Local Legislatures to deal with such property and civil rights in the Provinces, and the administration of justice in the Provinces, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in such civil matters in those courts, as the Local Legislatures have a right to deal with, reading, of course, those matters so to be dealt

with, as subject and subordinate to the superior powers and authority of the Dominion Parliament over all subjects not assigned exclusively to the Legislatures of the Provinces, of which subjects pre-eminently prominent as beyond the jurisdiction or control of the Local Legislatures stand the privileges, immunities and powers to be held, enjoyed and exercised by the Senate and by the House of Commons, and by the Members thereof respectively, and all rights connected with the qualifications and disqualifications of persons to sit or vote as Members of the House of Commons, the voters at the election of such Members, the Returning Officers, the proceedings at elections, and the trial of controverted elections, and all proceedings incident thereto.

Transferring this new and peculiar jurisdiction vested in the House of Commons to the Supreme and Superior Courts—in other words, substituting those courts in place of the House of Commons in relation to these matters, with which the Local Legislatures have nothing whatever to do—can, in no way that I can perceive, militate against, or derogate from, the right of the Local Legislatures to make laws in relation to all subjects or matters exclusively reserved to them. Nor can I discover that, in so substituting the Judges of the Supreme and Superior Courts, the Parliament of the Dominion has in any way transcended its legislative powers. These courts are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures respectively. They are not mere local courts for the administration of the local laws passed by the Local Legislatures of the Provinces in which they are organized. They are the courts which were the established courts of the respective Provinces before Confederation, existed at Confederation, and were continued with all laws in force, “as if the union had not been made,” by the 129th sect. of the B. N. A. Act, and subject, as therein expressly provided, “to be repealed, abolished or altered by the Parliament of Canada, or by the Legislatures of the respective Provinces, according to the authority of the Parliament, or of that Legislature, under this Act.” They are the Queen’s Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures, provided always such laws are within the scope of their respective legislative powers.

If it is *ultra vires* for the Dominion Parliament to give these courts jurisdiction over this matter, which is peculiarly subject to

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the legislative power of the Dominion Parliament, must not the same principle apply to all matters which are in like manner exclusively within the legislative power of the Dominion Parliament? And, if so, would it not follow, that in no such case could the Dominion Parliament invoke the powers of these courts to carry out their enactments in the manner they, having the legislative right to do so, may think it just and expedient to prescribe? If so, would it not leave the legislation of the Dominion a dead letter till Parliament should establish courts throughout the Dominion for the special administration of the laws enacted by the Parliament of Canada?—a state of things, I will venture to assume, never contemplated by the framers of the B. N. A. Act, and an idea to which, I humbly think, the Act gives no countenance; on the contrary, the very section authorizing the establishment by Parliament of such courts, speaks only of them as “additional courts for the better administration of the laws of Canada.” It cannot, I think, be supposed for a moment that the Imperial Parliament contemplated that until an Appellate Court, or such additional courts, were established, all or any of the laws of Canada enacted by the Parliament of Canada, in relation to matters exclusively confided to that Parliament, were to remain unadministered for want of any tribunals in the Dominion competent to take cognizance of them.

Whether, then, this Act is to be treated as declaring the courts named Dominion Election Courts, or whether it is to be treated as merely conferring on particular courts already organized a new and peculiar jurisdiction, is a matter, to my mind, of no great importance, as I think, while they have clearly the power of establishing a new Dominion Court, they have likewise the power, when legislating within their jurisdiction, to require the established courts of the respective Provinces, and the judges thereof, who are appointed by the Dominion, paid out of the treasury of the Dominion, and removeable only by address of the House of Commons and Senate of the Parliament of the Dominion, to enforce their legislation.

If the Dominion Parliament cannot pass this Act, this startling anomaly would be produced, that, though with respect to the rights and privileges of Parliament the Dominion of Canada is invested with the same powers as at the passing of the Act pertained to the Parliament of Great Britain, and though exclusive jurisdiction over, and the exclusive right to provide for, the trial of controverted elections is specially conferred on the Dominion Parliament, and though the constitution of the Dominion is to be similar to

that of Great Britain, there are, in connection with these privileges and these elections, matters with which there is no legislative power in the country to deal; for it is very clear that, as there is no pretence for saying that the Local Legislatures have any legislative power or authority over the subject-matters dealt with by the Act, so nothing the Local Legislatures might say or do could affect the question, and therefore, however desirable, it might be universally admitted, that just such a tribunal for settling these questions should be established in the very terms of this Act, the Dominion would be in this extraordinary position, that no legislation in the Dominion could accomplish it, for the simple reason that, if legislated on, as has been done by the Dominion Parliament, the legislation would be *ultra vires*; any legislation by the Local Legislatures would, if possible, be even more objectionable, they not having a shadow of right to interfere with the rights and privileges of Parliament, or the election of Members to serve therein, or to establish any tribunal whatever to deal with or affect either, as the whole and sole legislative power to intermeddle or deal with such rights and with elections and controverted elections is conferred on and vested in the Dominion Parliament alone.

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To hold that no new jurisdiction, or mode of procedure, can be imposed on the Provincial Courts by the Dominion Parliament, in its legislation on subjects exclusively within its legislative power, is to neutralize, if not to destroy, that power and to paralyze the legislation of Parliament. The statutes of Parliament, from its first session to the last, shew that such an idea has never been entertained by those who took the most active part in the establishment of Confederation, and who had most to do with framing the B. N. A. Act, the large majority of whom sat in the first Parliament. A reference to that legislation will also shew what a serious effect and what unreasonable consequences would flow from its adoption.

There is scarcely an Act, relating to any of the great public interests of the country which have been legislated on since Confederation, that must not in part be held *ultra vires* if this doctrine is well founded, for in almost all these Acts provisions are to be found, not only vesting jurisdiction in the Provincial Courts, but also regulating, in many instances and particulars, the procedure in such matters in those courts, as a reference to a number I shall cite will abundantly shew.

In the first session of the Dominion Parliament, in the Act

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respecting Customs, 31 Vict. cap. 6, by sect. 100, all penalties and forfeitures relating to the Customs or to Trade and Navigation, unless other provision be made for the recovery thereof, are to be sued for by the Attorney-General, or in the name or names of some officer of Customs, or other person thereunto authorized by the Governor in Council, and if the prosecution be brought before any County Court or Circuit Court it shall be heard and determined in a summary manner upon information filed in such court. And by other sections special provisions are made for the mode of procedure in reference to cases of this description, as also for the protection of the officers, entirely different from the procedure in ordinary civil cases.

So, also, by the Act respecting the Inland Revenue, 31 Vict. cap. 8, provisions are made for the protection of the officers of the Inland Revenue, whereby the proceedings in the Provincial Courts are restrained and regulated. And by 31 Vict. cap. 10, for regulating the Postal Service, the enactments of the Acts respecting Customs, more especially for the protection of officers, are extended and applied to officers employed in the Post Office.

And in the Public Works Act, 31 Vict. cap. 12, sec. 48, all costs in awards made by the arbitrators under that Act, where the award is in favour of the claimant, shall be taxed by the proper officer of the Court of Queen's Bench, Supreme Court, or Common Pleas, in the Provinces of Ontario, Nova Scotia and New Brunswick, and in Quebec by a Judge of the Superior Court.

So by the 31 Vict. cap. 15, sect. 7, of the Act to prevent unlawful training to the use of arms, provision is made for the protection of Justices and others acting under this Act, which regulates in a very special manner the procedure in all courts where such actions may be brought.

So by the 31 Vict. cap. 17, an Act for the settlement of the affairs of the Bank of Upper Canada, authority was given to the Court of Chancery, or a Judge thereof, to make orders and directions with reference to the trust therein referred to.

So by the 31 Vict. cap. 23, an Act to define the privileges, etc., of the Senate and House of Commons, and to give necessary protection to persons employed in the publication of Parliamentary papers, provision is made on certificate of Speaker of either House for the immediate stay of, and putting a final end to, all civil or criminal proceedings in any court in Canada.

So under the Trade Mark and Designs Act, 1868, in case any

person not being the lawful proprietor of a design be registered as proprietor thereof, the rightful owner is authorized to institute an action in the Superior Court in Quebec, in the Court of Queen's Bench in Ontario, and in the Supreme Courts of Nova Scotia and New Brunswick, and the course of procedure is pointed out and specially regulated.

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So under 31 Vict. cap. 61, respecting fishing by foreign vessels, special provisions are made for the protection of officers by regulating the issuing of writs, and otherwise regulating the proceedings in informations and suits brought under the Act.

So with respect to the Act relating to aliens and naturalization, 31 Vict. cap. 66, duties are imposed on the Judges of any Court of Record in Canada, and on the Provincial Courts therein named, as to admitting and confirming aliens in all the rights and privileges of British birth, and directing the mode of procedure in such cases.

So by the Railway Act, 1868, 31 Vict. cap. 68, sect. 15, the duty of appointing arbitrators is imposed on a Judge of one of the Superior Courts in the Province in which the place giving rise to the disagreement is situated.

So, also, by sub-sect. 13 as to ordering notices, and by sect. 15 as to appointing sworn surveyors; 19, as to taxing costs; 22, appointing, on death of arbitrator, another; 24 and 25, vesting in Judge the summary power of determining the validity of any cause of disqualification urged against arbitrator; 27 and 28, power to Judge to issue warrant to Sheriff to put company in possession of land under award or agreement; and in many other matters in said Act quite distinct from the jurisdiction and procedure in ordinary civil cases.

32 and 33 Vict. cap. 11, patents for inventions: Provision is made for actions for infringement and impeachment of a patent, and for power of courts and procedure and pleading in such cases.

And notably, with respect to insolvency, by the first Insolvent Act, 1869, and Act in amendment thereof of 1870, summary jurisdiction is given to judges and courts, and appeals to judges and from judges to courts, and Provincial Courts are clothed with powers, and modes of procedure are given them, which the Local Legislatures could have no right to confer, as they have no right to legislate on the subject matter of insolvency. And in Ontario, the Judges of the Superior Courts of Common Law and of the Court of Chancery, or any five of them, of whom the Chief Justice of On-



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tario, or the Chancellor, or the Chief Justice of the Common Pleas shall be one, are required to make and settle such forms, rules and regulations as shall be followed in the proceedings in Chancery (*sic*). And in Nova Scotia an entirely new jurisdiction is given in insolvency to the Probate Courts or judges of probate, which they never in any way before possessed.

And as to banks and banking, 34 Vict. cap. 5, jurisdiction in a summary manner is given to the Superior Courts of Law and Equity to adjudicate as to the parties legally entitled to shares, and the mode of procedure is there pointed out.

And as to the Public Lands of the Dominion, 35 Vict. cap. 23, a summary remedy is given to a judge of any court, having competent jurisdiction in cases respecting real estate, to grant an order which shall have the force of a writ of *Hab. Fac. Pos.*, upon proof to his satisfaction that land forfeited should properly revert to the Crown, to deliver up the same, etc., and the mode of procedure is provided by the Act.

37 Vict. cap. 45, Inspection of Staple Articles, as to actions or suits against any person for anything done in pursuance of this Act, limitations and restrictions are imposed and directions given as to procedure before and at trial and on giving judgment.

I do not, of course, put forward this legislation as in itself in any way determining, or even as confirmatory of the right of the Dominion Parliament so to legislate, for it is too clear that if they do not possess the legislative power, neither the exercise nor the continued exercise of a power not belonging to them could confer it or make their legislation binding. But I put forward these Acts as illustrative of the powerlessness, or perhaps I should rather say helplessness, of the Dominion Parliament, if they have not the right to legislate without control in the most full and ample manner over all matters specially or generally confided to them by the Imperial Parliament, and over which all must admit they have sole control, without being met by so effectual an obstruction, in giving effect to such legislation, as by closing the Queen's Courts against the administration of laws so enacted by and under the authority of the Parliament of Great Britain, by virtue of which the Dominion and Provincial constitutions now exist, and also as illustrative of the utter want in the Dominion, if the Dominion Parliament does not possess it, of any legislative power to meet emergencies requiring legislative control in matters so unequivocally affecting the peace, order and good government of Canada, so clearly taken

from the Provincial Assemblies and confided to the Parliament and Government of Canada.

But I have had no great difficulty in arriving at the conclusion that this Act substantially establishes, as the Act of 1873 did, as respects elections, a Dominion Court, though it utilizes for that purpose the Provincial Courts and their Judges. In considering the B. N. A. Act, in the view just presented, as also the Dominion Act on the point to be now discussed, the following extract from the judgment of Turner, L. J., in *Hawkins v. Gathercole* (1), may not be inapplicable here. He says :

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" But, in construing Acts of Parliament, the words which are used are not alone to be regarded ; regard must also be had to the intent and meaning of the Legislature. The rule on this subject is well expressed in the case of *Stradling v. Morgan* in Plowden's Reports, in which case it is said at page 204 : ' The judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words, to be but particular where the intent was particular.' And, after referring to several cases, the report contains the following remarkable passage at page 205 : ' From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the Legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.'

" The same doctrine is to be found in *Eyston v. Studd* and the note appended to it, also in Plowden, pp. 459, 465, and many other cases. The passages to which I have referred, I have selected as containing the best summary with which I am acquainted of the law upon this subject. In determining the question before us, we

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(1) 6 De G., M. & G., at p. 20.

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have, therefore, to consider, not merely the words of the Act of Parliament; but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign meaning and extraneous circumstances, so far as they can justly be considered to throw light upon the subject."

In seeking to discover the intention of the Dominion Parliament, if Parliament had no power to add to the jurisdiction of a Provincial Court, or in any way interfere with its procedure, one is struck at the outset with the strong, if not irresistible, inference that this raises, that the intention of Parliament must have been to establish an independent tribunal in the nature of a Dominion Court, and not to add to the jurisdiction, or affect the procedure, of Provincial Courts, because it must, I think, be assumed that Parliament intended to do what they have a right to do, to legislate legally and effectively, rather than that they intended to do what they had no right to do, and which, if they did do, must necessarily be void and of no effect; and having established a Court by the Act of 1873, which it seems to be admitted is *intra vires*, is it reasonable to suppose that Parliament would repeal a valid enactment, and for the accomplishment of substantially the same object, substitute in its place a law beyond their powers to enact, and which, therefore, could be nothing but a dead letter on the Statute Book? But as, for the reasons I have stated, I think, even if a distinct and independent court is not created, the Act is not beyond the power of Parliament, I cannot invoke this inference, as it appears to me those holding the contrary opinion might and should do.

But, independent of all this, the Act seems to contain within itself everything necessary to constitute a court.

The jurisdiction is special and peculiar, distinct from, and independent of, any power or authority with which any of the courts, or the judges referred to in it, were previously clothed. The Act conferring this jurisdiction provides all necessary materials for the full and complete exercise of such jurisdiction in a very special manner, wholly independent of, and distinct from, and at variance with, the exercise of the ordinary jurisdiction and procedure of the courts.

The rights which are to be determined through the instrumentality of this new jurisdiction are political rather than civil rights, within the usual meaning of that term, or within the meaning of

that term as used in the B. N. A. Act, which, as I have said, applies, in my opinion, to mere limited civil rights, and thus we find them treated in the case of *Théberge v. Landry* (1), which was an application to the Privy Council for special leave to appeal from the decision of the Superior Court of Quebec, under the Controverted Election Act, 1875, declaring an election void, which was refused.

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The Lord Chancellor in that case speaks of the Quebec Controverted Election Acts thus :

“These two Acts of Parliament, the Acts of 1872, 75, are Acts peculiar in their character. They are not Acts constituting or providing for the decision of mere ordinary civil rights, they are Acts creating an entirely new, and up to that time unknown, jurisdiction in a particular court of the colony, for the purpose of taking out, with its own consent, of the Legislative Assembly, and vesting in that court that very peculiar jurisdiction which, up to that time, had existed in the Legislative Assembly, of deciding election petitions, and determining the *status* of those who claimed to be members of the Legislative Assembly. A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known.

“Now, the subject-matter, as has been said, of the legislation is extremely peculiar. It concerns the rights and the privileges of the electors, and of the Legislative Assembly, to which they elect members. Those rights and privileges have always, in every colony, following the example of the mother country, been jealously maintained and guarded by the Legislative Assembly; above all, they have been looked upon as rights and privileges which pertain to the Legislative Assembly in complete independence of the Crown, so far as they properly exist, and it would be a result somewhat surprising, and hardly in consonance with the general scheme of the legislation, if, with regard to rights and privileges of this kind, it were to be found that in the last resort the determination of them no longer belonged to the Legislative Assembly, no longer belonged to the Superior Court, which the Legislative Assembly had put in its place, but belonged to the Crown in Council with the advice of the advisers of the Crown at home, to be determined with-

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(1) 2 App. Cas. 102.

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out reference either to the judgment of the Legislative Assembly, or of that court which the Legislative Assembly had substituted in its place."

The object of the Act of 1873 and that of 1874 was the same, the recitals in both are precisely alike, and the provisions are in many respects substantially the same. That object was to establish and substitute entirely new tribunals for the trial of election petitions, in lieu of the committees theretofore dealing with such matters, and both Acts alike contained all provisions necessary, not only to give such new tribunals full jurisdiction, but also all necessary and suitable provisions to enable them, and the judges thereof, effectually to exercise such jurisdiction, not only with reference to the principles, but also to the rules and practice by which they should be governed and act in dealing with election petitions. The object of the two Acts being then precisely the same, the accomplishment of the desired result being by instrumentalities substantially much the same, if, as I understand, it is generally conceded, by those that hold the Act of 1874 *ultra vires*, that the Act of 1873 established an independent Dominion Court, and was within the power of the Dominion Parliament, I am somewhat at a loss to understand how it can be said that the tribunals established by the Act of 1874 are not equally within the power of the Dominion Parliament.

The judges cannot sit in controverted election matters under the general jurisdiction of their respective courts, for those courts have no jurisdiction in such cases, and therefore, in discharging the duties imposed by this Act, they do not and cannot do so as judges of the respective courts to which they belong, but they act as Election Judges appointed by and under the Act, outside of and distinct from the jurisdiction they exercise in their respective Provincial Courts, which is left untouched by this Act.

Without relying too much on the statute of 1873, which, though a repealed statute, being *in pari materia* with that of 1874, might properly be referred to for the purpose of construing the latter (1),

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(1) See *ex parte Copeland*, 2 De G. M. & G., 920, where Lord Justice Knight Bruce says: "Although it has been repealed, still, upon a question of construction arising upon a subsequent statute on the same branch of the law, it may be legitimate to refer to the former Act. Lord Mansfield, in the case of *The King v. Lordale*, thus lays down the rule: 'Where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system and as explanatory of each other.'" 1 Burr. 44.

I think a careful and critical examination of the Act of 1874 will exhibit an evident intention that, as the first did, so does the last establish an independent Dominion Election Court.

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This is more especially noticeable with reference to the enactments under the headings "interpretation clauses," "procedure," "jurisdiction and rules of court," "reception and jurisdiction of the judge," "witnesses," and the provision as to who may practise as agent or attorney, or as counsel in such courts in the case of such petitions, and all matters relating thereto before the court or judge. I will only notice more particularly some of them. 1st. The power given to make rules. It provides that the judges of the several courts in each Province, respectively, or a majority, which, in Ontario, would include the Judges of the Court of Error and Appeal, Queen's Bench, Common Pleas and Court of Chancery, shall make such rules, and until such rules are made, "the principles, practice and rules on which petitions touching the election of members of the House of Commons in England are, at the passing of this Act, dealt with, shall be observed," etc. 2nd. As to the reception, expenses and jurisdiction of the judge. The judge is to be received not as a Judge of the Superior Court in that character, but as a Judge of the Election Court, in like manner as if he were about to hold a sitting at *nisi prius*, or a sitting of the Provincial Court of which he is a member, shewing that the Legislature did not contemplate that he was then actually about to sit as a member of the Provincial Court, but as being about to try an election petition, and when about to do this he is to be treated as if he were about to hold a sitting of the Provincial Court of which he is a member, and when his powers in such a trial, and in other proceedings under this Act, are defined, he is not treated simply as a Judge of one of the Superior Courts upon whom, as such, further jurisdiction is conferred, but similar powers, as such judge, are given him in the court held by him, and that court so held by him is declared to be a Court of Record, indicating, I think, very clearly, that the court was treated by the Legislature as distinct from a Provincial Court, and required this statutory declaration to make it a Court of Record, and that the judge was not to be considered as then acting as a judge of a Provincial Court, nor the trial as a trial in such a court. The words of the clause, sect. 48, are these :

"On the trial of an election petition, and in other proceedings under this Act, the judge shall, subject to the provisions of this

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Act, have the same powers, jurisdiction and authority as a judge of one of the Superior Courts of Law or Equity for the Province in which such election was held, sitting in term, or presiding at the trial of an ordinary civil suit, and the Court held by him for such trial shall be a Court of Record."

So, in like manner, are the witnesses treated as being subpoenaed, sworn and treated, not as being actually within the jurisdiction of the Provincial Courts, but section 49 declares that they—

"Shall be subpoenaed and sworn in the same manner, as nearly as circumstances will admit, as in cases within the jurisdiction of the Superior Courts of Law or Equity in the same Province; and shall be subject to the same penalties for perjury."

So, again, in the provision made for regulating the persons entitled to practise as attorneys or barristers before the tribunal thus established, such tribunal is very clearly distinguished from the Provincial Courts. The clause, sect. 67, is this:

"Any person who, according to the law of the Province in which the petition is to be tried, is entitled to practise as an attorney-at-law or solicitor, before the Superior Courts of such Province, and who is not a member of the House of Commons, may practise as attorney or agent, and any person who, according to such law, is entitled to practise as a barrister-at-law, or advocate, before such courts, and who is not a member of the House of Commons, may practise as counsel, in the case of such petition, and all matters relating thereto, before the court or judge in such Province."

Reading these special provisions in connection with the Act of 1873, and what has been said of the Act generally, I think it is not arriving at a forced or unnatural conclusion to say that that Parliament intended to establish Dominion tribunals exceptional in their jurisdiction, perfect in their procedure, and with all materials for exercising such jurisdiction, and having nothing in common with the Provincial Courts; that these judges and courts were merely utilized outside their respective jurisdictions for giving full effect to these statutory tribunals to deal with this purely Dominion matter.

An objection has been suggested by a learned judge, for whose opinion I have the very highest respect, and which has been treated as of much force by another learned judge of a different Province, and on that account I will notice it. It is said that, if this is a court distinct from the courts of which the judges are primarily members, the judges have never been appointed thereto by the

Crown, nor sworn as judges thereof, and therefore they are not judges of this new tribunal, if, as such, it exists. But, in my humble opinion, there is no force in this objection. The judges require no new appointment from the Crown; they are Statutory Judges in Controverted Election matters by virtue of an express enactment by competent legislative authority. The statute makes the judges for the time being of the Provincial Courts, judges of these peculiar and special courts. The Crown has assented to that statute; therefore they are judges by virtue of the law of the Dominion, and with the Royal sanction and approval. As to their not being sworn, the statute has not provided they should be sworn. If, being sworn judges already, the Legislature was willing to entrust them with the power conferred by this Act, without requiring them to be sworn anew, how does this invalidate the Act, and how can the judges refuse to discharge the duties thus by law imposed on them, because, it may be, the Parliament might, or ought to have gone further and required the judges to be specially sworn faithfully to discharge these special duties? Under the law of 1873, the judges in all the Provinces acted in what, it is admitted, were new Dominion Courts, without being specially appointed or sworn, the statute not requiring either, and I have yet to learn that their proceedings on that account ever have been or ever could be questioned.

As, then, I can see no reasons why the Dominion Parliament should not delegate to the judges of the several Provinces, individually or collectively, or both, whom they appoint and pay, and can by address remove, power to determine controverted elections, the doing of which, not being inconsistent, or in any way in conflict with their duties as judges of their respective courts, but, on the contrary, as shewn by the present legislation of all the Provinces in reference to controverted elections in the Local Legislatures, in so acting they are most suitable and proper tribunals, and as the Imperial Parliament has left it to the Parliament of Canada to provide for the trial of controverted elections and proceedings incident thereto, and they have discharged this duty by the Statute of 1874, utilizing existing judicial officers and established courts, by engrafting on, or establishing independent of, those courts throughout their respective Provinces tribunals eminently qualified to discharge the important duties assigned to them, they have not, in so doing, in my opinion, in any particular invaded the rights of the Local Legislatures, or brought the new jurisdiction, or

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the procedure under it, in any way in conflict with the jurisdiction or procedure of any of the courts of the Provinces; and therefore the Dominion Parliament, in enacting the Act of 1874, have not, in my opinion, exceeded the express power conferred on them to provide for the trial of controverted elections and proceedings incident thereto; and therefore I think this appeal must be dismissed with costs, and the case remitted to the court below, to be proceeded with according to the due course of law.

[TRANSLATED.]

FOURNIER, J. :—

The sole question submitted by the present appeal is, whether the Federal Parliament had the power to pass the Controverted Elections Act of 1874.

This question, the importance of which it is impossible to exaggerate, has been very learnedly discussed, and decided in different ways by the several Provincial Courts before whom it has been raised.

The reasons given on both sides are set out with the greatest fulness, and are certainly worthy of every possible consideration; but, after the thorough review of them by the Chief Justice, there would be no advantage in giving another summary of them here. For this reason I shall content myself with giving briefly the principal reasons which have made me adopt the same conclusion as that of my honourable colleagues.

It was in 1873 that the Federal Parliament, exercising for the first time the power conferred on it by the 41st section of the B. N. A. Act to legislate on the subject of contested elections, adopted and established by statute 36 Vict. c. 28, the principle of referring to the judicial power the decision of contested elections, which, until then, had been decided by the Houses of Parliament, or their committees, to the exclusion of the ordinary tribunals. The law, the legality of which is attacked in this case, although it has revoked the first statute, retains the principle of reference to the judicial power, as well as a large number of its other provisions.

Several of the honourable judges called on to decide this question have entered into a very detailed critical examination of the principal provisions of these two laws, in order to prove that the first (that of 1873) was constitutional in creating a special Election Court, in virtue of section 101 of the B. N. A. Act, while the second is unconstitutional, in assuming the power to extend the jurisdiction of certain Provincial Courts to the decision of contested elections,

a subject-matter with which they were not before competent to deal.

I do not think it necessary to enter into an examination of the reasons brought forward to establish this distinction ; nor into an examination of this other question, namely, whether the Act of 1874 did not constitute, as did that of 1873, a Federal Court, and, in consequence thereof, the law being within the powers given to the Federal Parliament by sec. 101, of creating additional tribunals, should be declared constitutional.

It is sufficient for me to say that, if the proposition that the Federal Government cannot impose new duties on the courts and judges existing at the time of Confederation is correct, these two Acts are open to the same objections, for in both, the Provincial tribunals and the *personnel* which compose them, have the performance of new duties devolved on them. It matters little, for the decision of the real issue raised in this discussion, whether the new judicial duties have been imposed on judges and on courts in one case, as has been done by the Act of 1873, under the denomination of an Election Court, or whether, in the other case, such duties have been imposed, as has been done by the Act of 1874, on Provincial Courts and on judges under the names by which they are designated in the Provincial laws which have given them existence. The question, nevertheless, remains the same ; for whether the judges are taken collectively as a court, or in their quality of individual members of the court, it always comes back to the question as to whether the Federal Parliament had the power to impose upon them new duties.

Thus, the question seems to me to be reduced simply to one whether the Federal Parliament has the power, which has been so emphatically and energetically denied to it by some honourable judges, whose opinion I greatly respect, to impose new duties on Provincial judges and tribunals, and even to extend their jurisdiction, if necessary. I regret to be obliged to say that on this subject I entertain an opinion diametrically opposed to theirs.

If I do not hesitate to make this declaration it is because a still larger number of honourable judges have adopted this view, which, besides, seems to me in accord with the spirit and letter of the constitution.

If the proposition which I have above laid down be not correct, it necessarily follows that the authors of Confederation have omitted

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to create, for the execution of federal laws, a judicial power co-existing with the new order of things.

The preamble of the B. N. A. Act indicates, however, that their first duty was to endow the federal union of the Provinces with a constitution based on the same principles as that of the United Kingdom. One of the essential elements of the British Constitution, as of every regular Government, is the creation of a judicial power, such power and the legislative and executive powers forming the three indispensable elements of every Government. Have they committed a mistake of such a very grave nature as never to have thought of the creation of a judicial power? In the opinion of some, this strange omission was made, and thus there existed between the 1st of July, 1867, when the B. N. A. Act came into force, and the meeting of the Federal Parliament, in November, 1867, an interregnum of four months, during which time there could not be found a single tribunal competent to execute the federal laws.

Notwithstanding this, from the moment the new constitution came into force, the Federal Government became proprietor of all the public properties enumerated in Schedule 3 of the B. N. A. Act, at the same time that it became charged with the execution of the laws relating to customs and excise, and, by the 41st section, of the electoral laws which remained in force. It would have found itself, therefore, during such interregnum, under the impossibility either of protecting its properties or of collecting its revenues, recourse to the Provincial Courts being forbidden.

But this argument is answered by alleging that such a great mistake has not been committed; that, on the contrary, by section 101, the Government of Canada is invested with the power of creating a Court of Appeal and additional tribunals for the better administration of its laws; that ample powers in this respect were given to it, precisely because the exclusive power of organizing tribunals for the Provinces was reserved to the Legislatures, and that thus the two Governments have each their peculiar and exclusive rights of creating tribunals.

In my opinion, sec. 101 does not justify this conclusion. It does not in terms establish a judicial power; it only gives the right to establish, as circumstances and requirements might demand, a Court of Appeal and *additional* tribunals for the *better execution* of the laws. According to the terms of this section, there were tribu-

nals already existing for the execution of federal laws, since this power is given to be exercised only "from time to time," in the words of the section—that is to say, in the event of the existing tribunals becoming, for any reason, incapable of executing the federal laws. If this section was not intended to recognize the existence of a federal judicial power, it would have been differently drawn—it would have been just as easy to have directed the immediate creation of a Court of Appeal, or of any other tribunal, as to have allowed their creation at some future time. If this was not done, it was, doubtless, because the judicial power, whose existence was preserved by sec. 129, was recognized as being still sufficient for the requirements of the country for a long time, and the power to create new tribunals was prudently left to be exercised in the future according to circumstances. Certainly sec. 101, which gives only an optional power, cannot be relied on to prove that the authors of Confederation created a judicial power suitable to the immediate needs of Confederation. It is by other sections that a judicial organization has been effectively established and completed, in such a manner as to come into existence at the same time as the constitutional Act itself.

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This organization depends upon various provisions of the B. N. A. Act, to which I shall allude after having mentioned those on which reliance is most strongly placed for contesting its existence.

The opponents of the constitutionality of the law in question found their principal arguments on sub-sections 13 and 14 of section 92, giving to the Legislatures exclusive jurisdiction over "property and civil rights in the Province," and "the administration of justice in the Province," including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

I admit, without hesitation, the exclusive control of the Legislatures over these two classes of subjects. To them alone belongs, without doubt, the right of regulating civil rights *in the Province*, as well as the organization of courts of justice *for the Province*, and the Federal Parliament would certainly exceed its power if it were to legislate on these matters for the Province. But does it necessarily follow that the latter has no jurisdiction over civil rights which concern only the Dominion in general, as well as over the organization and maintenance of courts in so far as the Dominion is interested? Do these two paragraphs contain an absolute exclusion of

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all jurisdiction in the Dominion Parliament? I do not think so. It seems to me, on the contrary, that these very terms are opposed to an interpretation so restricted. In fact, the words "in the Province," following the enumeration of the powers given over civil rights, and the organization of courts, effectually confine the exercise of these powers to the limits of the Province, but do not go so far as to exclude the exercise by the Federal Parliament of a similar jurisdiction over the different classes of civil rights which are confided to it. Nothing is clearer nor more certain than that the Legislatures have not a complete jurisdiction over civil rights. If such were the case, the term "civil rights," comprehending, in opposition to the criminal law (*droit criminel*), all the rights which a subject can enjoy, it would follow that the Provinces would have an unlimited jurisdiction over everything not belonging to the criminal law. The distinction which some have wished to make between civil rights and political rights is not founded on any positive authority. The term "political rights" has not in English jurisprudence (*droit anglais*) a technical meaning established either by law or by judicial decisions. To express the same idea, Blackstone uses, indifferently, the words "civil liberty" or "political liberty." His subdivision of rights into four classes was for no other reason than to facilitate the discussion of them; as he puts it: "In order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically under proper heads." Neither has the decision of the Privy Council in the cause of *Théberge v. Landry* (1) established, as is pretended, a distinction between civil rights and political rights. Lord Cairns says, in speaking of the two laws of Quebec, relating to contested elections, that their object was not to provide for the decision of "mere ordinary civil rights," and he describes also this legislation as "extremely peculiar," but he does not say that its object was to legislate on political rights as a subject distinct from civil rights. He does not even make use of the words "political rights" in his judgment. The language which he makes use of on the subject is in conformity with what Blackstone says on the subject of the division of rights. To shew conclusively that the term "civil rights," in sub-section 13, cannot have the extensive meaning which it is desired to give it, it is sufficient to recall to mind that bankruptcy and insolvency, patents of invention and discovery, the rights of authors, marriage

and divorce, and many other subjects which, without any doubt, are comprised in the general term "civil rights," are, notwithstanding, exclusively within the jurisdiction of the Federal Parliament.

It would, therefore, be more correct to say that the legislative power over the subject of "civil rights" has been divided between the Federal Parliament and the Legislatures, than to conclude that it is wholly within the exclusive domain of the latter. I cannot, for these reasons, see in sub-section 13 obstacles to the exercise of the jurisdiction assumed by the Federal Parliament.

Nor has sub-section 14, concerning the organization of courts and procedure, the effect of depriving the Federal Parliament of all jurisdiction over Provincial Courts.

The position of the Provinces in the Canadian Confederation has been compared with that of the United States in the American Union, in order to draw therefrom the conclusion that the Provinces have an independence as complete as that of the States, and that the Federal Government cannot exercise any right whatever over Provincial Courts, any more than could the Congress of the United States with respect to the courts of the States. If there be, in many respects, an analogy between the two countries, there is certainly none whatever in the mode adopted for the distribution of the legislative power. In the American Constitution, a principle altogether opposed to that which has been followed in the B. N. A. Act has been adopted. The States, in consenting to enter the American Union, preserved their position of sovereign and independent States, under the limitation only of the powers specially delegated to Congress. Here precisely the reverse has been done. The Imperial Parliament, which has created the existing state of things, has judged it right to give to the Provinces only defined and limited powers, leaving to the Federal Government, after deducting the powers thus reserved, the exercise of all the powers of sovereignty compatible with the colonial state. This is evident from section 91. In fact, besides the exclusive power over the subjects mentioned in the 29th sub-sect. of sect. 91, the Federal Government is, in addition, invested with a sovereign authority over everything which has not been specially ceded to the Legislatures. The beginning of the section expresses itself thus on the subject :—

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"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for

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the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces, and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared, that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated."

(Then follow the 29 sub-sections setting forth the different subjects.)

It is evident, according to this section, that the powers of the Federal Parliament are of two kinds, the one defined and enumerated in the 29 sub-sections, the other undefined and consisting of the power to make laws for the peace, order and good government of Canada, and having no other limits or restrictions than those contained in the 16 sub-sections of sect. 92.

As it was scarcely possible to make a complete enumeration of all the powers, and, no doubt, to avoid grave inconveniences, use was made in drawing our Constitution, as in that of the United States, of general language, containing in principle the conferred powers, leaving to future legislation the task of completing the details. To interpret this section, the following observations can be applied:—

"In the opinion which was delivered, the Court observed that the Constitution unavoidably dealt in general language, and did not enter into a minute specification of powers, or declare the means by which those powers were to be carried into execution. This would have been a perilous and difficult, if not an impracticable task; and the Constitution left it to Congress, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers as its own wisdom and the public interest would require." (1)

But the language of sect. 91, general though it may be, is amply sufficient to confer the power which has been exercised; at any rate, in the absence of proof that in doing so there has been committed an infringement on the special powers of the Provinces. But, on the contrary, it is admitted on all sides that the subject-matter of the law which is attacked is not within the jurisdiction of the Legislatures. From the nature of the subject, as well as by

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(1) 1 Kent's Com., p. 389.

the provisions of sect. 41, all jurisdiction over contested Federal elections is denied to the Legislatures. Thus the argument based on the fact that the Legislatures have the exclusive power of regulating procedure can have no weight in face of sect. 41, which confers specially on the Federal Parliament the right not only to legislate respecting contested elections, but, in addition, that of regulating their procedure, "and proceedings incident thereto," says the section. No Legislature being able to set up the pretension of a right to regulate the procedure with respect to this matter, there is then in this case no usurpation of powers by the law in question. This point seems to me so clearly established by the wording of the section that I do not believe it susceptible of doubt.

Independently of sect. 41, sufficient, in my opinion, to justify the passing of the law which has been called in question, there is, besides, sect. 129, which gives in formal terms to the Federal Government the most extensive powers over the courts in existence, namely, those of *repealing, abolishing, or altering* them.

"Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick, at the union, and all courts of civil and criminal jurisdiction, and all legal commissions, powers and authorities, and all officers, judicial, administrative and ministerial, existing therein at the union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively, as if the union had not been made; subject, nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland), to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament, or of that Legislature under this Act."

Could stronger or fuller language be used to give jurisdiction over these courts? I think not. The effect of this section, to which they owe their very existence, is evidently to place them under the legislative power of the Federal Government as well as, it is true, under that of the Local Government, and to make them, in fact, common to both these Governments for the administration of the laws adopted by them within the limits of their respective powers.

Since they are subject to the condition of being repealed, abolished or altered by either of these Governments, these courts are not, therefore, as has been asserted so positively, subject solely to the

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authority of the Local Legislatures. The terms of this section leave no doubt as to the power of the Federal Government to impose new duties on the judges and courts, since it has the power of repealing, abolishing, or altering them "according to the authority of the Parliament . . . . under this Act." It is no doubt on account of this reserved authority that the Federal Government was given, by sects. 96 and 100, the appointment of the judges, and was charged with the payment of their salaries. If they were to remain under the exclusive control of the Local Legislatures, and not subject to the performance of any duties which might be imposed by the Dominion Parliament, their appointment and the payment of their salary would most likely have been left to the Local Government.

Thus each time the Federal Parliament passes a law on a matter within its jurisdiction, imposing on the judges or on the courts new duties, it exercises the power given it by this section of altering the courts, and this law should be executed as fully as those of the Local Governments, whose powers over the courts, in virtue of this section, do not differ from those of Parliament, with the sole exception that each of them can exercise these powers only within the limits of its special powers (*attributions spéciales*). The courts are, in fine, the tribunals of Her Majesty, charged with the execution of all the laws to which she has given her sanction in virtue of the new Constitution.

The Superior Court of the Province of Quebec, designated in the law in question as one of those on which the contested jurisdiction is conferred, being in existence at the time of Confederation, became, in consequence, like all the others, liable to undergo the alterations which the Federal Government might think right to impose on it. Would it be the same with respect to a Court created since? That is another question, and as it cannot be raised in this cause, I do not think it necessary to consider it. Nor, taking the view which I have adopted, has it seemed to me necessary to consider the question whether, outside of the provisions of the B. N. A. Act, the Courts of original jurisdiction have not, as an inherent element of their constitution, sufficient jurisdiction to decide contested elections in the event of Parliament, instead of adopting the existing law, having simply abandoned the exercise of its exclusive jurisdiction over this subject. I have limited my observations to the sole question as to whether it had not, in fact, the power to confer this jurisdiction on Provincial Courts. Finding in the pro-

visions of the B. N. A. Act, above cited, a complete justification of the power exercised, I have not thought it necessary to go further.

From what precedes, I draw these conclusions :—1st. That paragraphs 13 and 14 of sect. 92 have not the effect of depriving the Federal Parliament of the jurisdiction which it has exercised in adopting the law in question. 2nd. That the general powers of sect. 91 and those of sect. 41 are sufficient to authorize this legislation. 3rd. That sect. 129 gives it the right to require the Provincial Courts to execute the law in question, as well as the other Federal laws adopted within the limits of its powers.

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The determination of the issue raised by the preliminary objection in this case, to the authority of the learned judge who presided at the trial of the petition, touching and questioning, as it does, the power of the Parliament of Canada to pass the Act under which that trial was being had, being most important, demanded and has received my most diligent study and consideration. I have carefully read and weighed all the judgments upon the subject delivered in Ontario, Quebec and New Brunswick, as well as the several statutes bearing upon it, and will endeavour, briefly, to give the conclusion at which I have arrived.

After mature consideration of the legitimate sources from which the power to try the merits of an election petition against the return of a Member of the House of Commons, which is now questioned, is derived, I have arrived at the conclusion that much has been written, many arguments used, positions taken, and theories advanced that are wholly unnecessary.

Arguments have been advanced from premises which do not exist, the determination of which cannot affect those that do, and upon which latter alone we are bound to decide. Some learned judges contend for the existence of an inherent power in Imperial and Provincial Courts to try such petitions, and that that power always existed, though in a latent condition ; being controlled in England by the assertion of the House of Commons of its exclusive jurisdiction, which, by degrees, became universally acknowledged as the law of the land, as being within the law and custom of Parliament ; and, in the several Provinces of the Dominion, by the assumption of a similar jurisdiction, and by statutes at different times passed. That so existing, but its exercise prevented, it would assert itself at any moment when the controlling power was removed

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by legislative enactment. By other learned judges the correctness of this theory is disputed, and lengthy and exhaustive arguments are advanced to establish the position that such a jurisdiction or power never existed. I do not think the settlement of that controversy at all necessary in the present case. In considering the issue before us, we are not driven to draw analogies in regard to the courts in England, and those of the several united Provinces, when we have sufficient otherwise upon which to base our judgment. It will be sufficient for us, and I think we are bound, to rest it on the statutes immediately applicable to the issue before us.

We have, in the united Provinces, a written constitution embraced in the Imperial statute, passed in 1867, for the object of uniting them. That statute contains the germs and distribution of the legislative functions and powers to be exercised in the general Parliament and the Provincial Legislatures, and to it we are irresistibly turned for guidance and direction.

In framing that Act, one of the first considerations would be, and no doubt was, to prevent, if possible, conflict in legislation, as between the general and local Legislatures; but no one can read it without seeing, from the necessarily peculiar distribution of the legislative powers, the difficulty of doing so. The present case is a proof of it, as appears by the antagonistic judgments given in relation to the question at issue. I cannot better exhibit the difficulty just referred to, and the opportunity offered by the necessarily peculiar provisions for the distribution of legislative powers to raise a question of conflict, than by a reference to the matter of "civil rights." I need not define here what may be included by that comprehensive term. It is sufficient for my present purpose to claim that a large portion of the "civil rights" are, legitimately and without question, affected, controlled and guarded by Dominion legislation, which interferes with and excludes local legislation on many branches of "civil rights," although by the distribution of legislative powers, "civil rights in the Province" is, by sub-sect. 14 of sect. 92, awarded specially to the local Legislatures.

There are but a small minority of the subjects given expressly to the Dominion Parliament that do not affect "civil rights within the Province," and its whole legislation in respect of them is clearly an authorized invasion of the powers of local legislation conferred by the general term "civil rights in the Province." The whole purview of the Act, with a proper consideration of its objects, is evidence of its policy to limit local legislation to those

"civil rights in the Province" not included specially or otherwise in the powers given to the Dominion Parliament.

In the construction of one part of the Act, it is not less our duty than our privilege to take into consideration every part of it; and when an apparent conflict is presented, we are bound to give weight to arguments drawn from a due appreciation of the objects which are apparent on the face of it, and, if possible, so to construe it as to give effect to all its provisions, and not so as to leave, unnecessarily, some of them inoperative.

The opening clause of sect. 91 of the B. N. A. Act, 1867, provides that "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." This is followed by a declaration that the annexed statement of powers should not restrict the general provision of the clause.

Had there been no limitation in this clause, the power "to make laws for the peace, order and good government of Canada" would have embraced every subject of legislation that could be presented, but there being a limitation, it is necessary to ascertain the nature and extent of it. It withholds from Parliament the right to legislate "in regard to matters coming within the classes of subjects by this Act assigned *exclusively* to the Legislatures of the Provinces." It will be observed that the words of this clause "by this Act" do not refer us specifically to sect. 92 or its provisions, but generally to the Act, to ascertain what is "*exclusively*" awarded to the Local Legislatures. We must look at the *whole Act*, and apply the result as the proper deduction from the otherwise comprehensive and unlimited powers given by the clause to the Parliament of Canada.

Taking, then, the Act, and considering it in all its objects and bearings, what are the necessary deductions to be made for those matters *exclusively* given by it to the Local Legislatures?—for it is only such as have been so *exclusively* given that form the exception.

Sub-sect. 13 of sect. 92 gives to the Local Legislatures the *exclusive* right to legislate in regard to "Property and civil rights in the Province," and sub-sect. 14, "The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."

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What, then, does the term civil rights in the *Province* include? This, I take it, would, if not controlled and limited by other provisions of the Act, include every question of civil rights arising between individuals in each Province, but no one could reasonably contend that legislation on the subjects of "The regulation of Trade and Commerce," "Navigation and Shipping," "Bills of Exchange," "Weights and Measures," "Interest," "Legal Tender," "Bankruptcy and Insolvency," and many others, including "Marriage and Divorce," by the local authorities, would not, taking the whole Act, be *ultra vires*, although otherwise coming within the scope and comprehension of the provision, "Civil rights within the Province."

Legislation by the Dominion Parliament on such subjects is legitimate and binding, and the Provincial Courts are bound to determine the "civil rights of parties" in the Province solely by it. I make these references to explain why, in my view, we should not construe the first clause of sect. 91, merely by sub-secta. 13 and 14 of sect. 92, but by the whole purview and object of the Act.

Being so guided, what are the local legislative powers under sects. 13 and 14? Deducting the indirect and incidental powers of legislation given by the Act to Parliament, the Local Legislatures have the *exclusive* right to legislate only in regard to the remainder. The question here, then, is, to which of the two Legislatures is given the power of legislating as to the trial of contested elections? In reply, let me say that that subject is not only given to Parliament, but excluded from the powers of the Local Legislatures. It is a subject, therefore, the latter cannot touch. It is not questioned but that Parliament has the power of dealing generally with the whole subject. It has that, not only under the provisions of the first clause of sect. 91, before cited, but by sect. 129 of the Imperial Act, which provides for the continuance of all laws, etc., existing at the union, "subject, nevertheless, . . . to be repealed; abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament, or of that Legislature under this Act."

By the terms of the clause just cited, all laws were continued in force, but in regard to the trial of contested elections to the House of Commons there was no statutory provision applicable, although such had previously existed in the several united Provinces. The first preamble to the Act is as follows: "Whereas, the Provinces of Canada, Nova Scotia and New Brunswick have expressed their

desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom ;" and the third preamble alleges the expediency of providing for "the constitution of the legislative authority in the Dominion." The conclusion is irresistible, from the suggestions contained in the preambles just referred to, and from the whole scope and meaning of the Act, that it was intended to leave no subject requiring legislation unprovided for ; and that in the powers given all should be included ; and, in the distribution, either Parliament or the Local Legislatures should deal with every subject. This consideration is of value when dealing with the present and other cases of a similar kind.

The question here is, however, not strictly one of a conflict of legislation, for, as to it, the Parliament alone has legislated ; nor is it claimed, that with reference to the subject-matter in question, any Local Legislature could deal ; nor, in reference to the general subject, that any legislative prerogative of the Local Legislatures has been invaded. The right of the Parliament to deal with the general subject of the trial of contested elections is admitted ; but it is objected, that in so dealing with it as to give to the Provincial Courts power to try them, and in framing the procedure, it has trenched on the prerogatives of the Local Legislatures to which were committed the right to deal with "civil rights in the Province," and "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts."

To determine the point, it becomes necessary, first, to ascertain the true meaning of the two sub-sects. 13 and 14.

First, then, as to "civil rights." We are told in some of the judgments to which I have referred that the rights involved in contested elections are not *civil* but *political* ones, and a judgment of the Privy Council is cited in support of that doctrine.

The answer I give to that proposition is, that although in France, in the United States and other countries, political rights are, in some regards, looked upon as differing from ordinary civil rights, there is no such distinction ordained in England, where "civil rights" cover and include those which the learned judges call political only. I have read the judgment of the Privy Council referred to, and can find in it no warrant for the allegation made in regard to it. "Political" rights are not mentioned as such, but

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the judgment is founded on the denial of the right of the Sovereign to review the judgment of a court under local statutes substituting it, in the trial of contested elections, for the Committee of the Legislative Assembly; and vesting in that court a "*very peculiar jurisdiction*, which, up to that time, had existed in the Legislative Assembly." The judgment, so far from distinguishing between political and civil rights, refers to those involved as civil rights, but not "*ordinary civil rights*."

The right of the Local Legislatures to legislate as to civil rights, as I have before stated, is subordinated to those civil rights not affected by Dominion powers of legislation and to those in *the Province*, and not including matters of a *general* character.

The 14th sub-section gives local authority to deal with "*administration of justice in the Province*," which I construe to mean the power of legislating for the administration of justice in the Province in regard to the subjects given by the Act, and, to that extent only, to provide for "*the constitution, maintenance and organization of Provincial Courts*," including the procedure necessary for the administration of justice in reference to those and kindred subjects. I have not failed to notice the comprehensiveness of the provision, including as it does *procedure* in civil matters in those courts. These words, I hold, must be considered with the context and with the objects and other provisions of the Act, and common sense and reason suggest how inartificial and incomplete the legislation must be that would confer unlimited power on the Dominion Parliament to deal with a subject such as the trial of contested elections, and leave the necessary *procedure* to give effect to its legislation to Local Legislatures which one or more might not enact at all, or in such a way as to be useless, or by such measures as would, in one Province, be essentially different from those in others. To contend that such was intended by the Act would, in my opinion, be a libel on the intelligence of the British Parliament. Although the contention against the right of the Dominion Parliament to provide for the procedure in contested election cases would apparently involve the absurdity I have just stated, such a position could not arise; for, in cases where the machinery in the Provincial Courts is defective for the trial of contested elections, the Local Legislature has clearly no power to supply it. The right, therefore, to provide for the *procedure* in contested election cases is a necessary adjunct to the right to legislate at all in respect to them.

Parliament, then, having, as I have endeavoured to maintain,

plenary powers over the whole subject, had it the power to impose on the Provincial Courts the duty of trying contested elections ?

Sect. 129 of the Imperial Act before mentioned, provides for the continuance of laws as existing at the union. The only law then existing in regard to the trials of contested elections, resulted from the inherent parliamentary right of the House of Commons to deal with them. No statute had then been passed to delegate the authority to a committee of the House or any other court. The right of the House of Commons to receive petitions against the returns of its Members, and deal with them, was, nevertheless, as effectual as any statute could have made it, and was such a law as, under the provisions of the latter clause of the section, might "be repealed, abolished, or altered by the Parliament of Canada." By the provisions of that section, as well as by the first clause of sect. 91 and sect. 41, the Dominion Parliament derived full authority to deal with the trial of contested elections. When having so dealt with the subject, no person, high or low, can violate its legislation. Everyone is bound by its provisions and prescriptions, unless, indeed, they conflict with the Imperial Act, by usurping the powers of the Local Legislatures. I have shewn that the Local Legislatures have no power over the subject, and therefore in that respect no such usurpation nor conflict could arise ; but the contention is, that as the constitution, maintenance and organization of Provincial Courts with the procedure therein in civil matters is given by subsect. 14 of sect. 92, the Dominion Parliament cannot, directly or indirectly, add to their functions or duties, or in any way add to the scope of their jurisdiction. I cannot draw any such conclusion from the Imperial Act. In the legislation as to the large majority of the subjects comprised in the 29 specifically and unquestionably given by sect. 91 to the Dominion Parliament, the power is found of directly adding to the functions, duties and jurisdiction of those courts ; and as the power to legislate in regard to contested elections is just as fully given by the Imperial Act, why should any distinction be drawn or attempted ? The only difference that I can discover is in the *manner* in which the power has been given, while none appears in substance.

If, in one case, the power exists, why not in the other ? If there is no *incompatibility* in the Provincial Courts in the one case—and none has been found or suggested—I am at a loss to discover why there should be any in the other. The Local Legislatures, even had they the power, have intervened no prohibitory legislation.

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The courts entertain, and adjudicate on, all matters presented to them under the common law and local statutes, and until it is shown that, whilst so doing, the additional duty of trying contested elections is incompatible with their other duties and obligations, I have no difficulty in arriving at the conclusion that they are equally authorized, as well as bound, by the provisions of the Dominion Acts, which are, in this case, objected to as *ultra vires*.

The Dominion Parliament, in the exercise of its plenary powers, had the right to impose the duty in question, the exercise of which, as far as I have been able to discover, does not in the slightest degree trench upon the legislative rights of the Local Legislatures, or conflict with the position of those courts in relation to their duties in regard to the other subjects which by the constitution the Local Legislatures can impose on them.

By this conclusion effect is given to the spirit and, I think, also, the letter of the Imperial statute in question, which a contrary one would not give. I do not forget that under the Imperial statute the Dominion Parliament might establish independent tribunals for the trials of election contests, as was done on one occasion in Nova Scotia, under the Act of 1873, but, although I acted as one of the judges of the special court at that time, I was not insensible to the objections which might be raised to such a tribunal, appointed *ad hoc* by the Government of the day to try the merits of a contest between a Government supporter and an opponent. To give public satisfaction in such, as in all other cases, the judicial tribunal must be free even from the slightest suspicion of weakness or bias. I have been gratified to witness the success that has been achieved in this respect from the transfer to the ordinary legal tribunals in England, and in this country, of the trial of election contests, but, at the same time, would not give my sanction to an Act which is *ultra vires*. I am glad, therefore, to be able to decide that the one in question is not so, and, consequently, I am of the opinion the appeal herein should not be allowed, and that the judgment herein of the learned Chief Justice of the Superior Court of Quebec should be affirmed with costs.

TASCHEREAU, J.:—

Upon the Respondent's motion to quash this appeal, I am of opinion that the appeal lies, and that this motion must be dismissed. The preliminary objections would, if allowed, have been final and conclusive, and have put an end to the petition, and the appeal has

been duly filed before the Act of last Session came into force (1); so that, under sect 10 of the said Act, the appeal stands, and the motion to quash must be dismissed.

Upon the abstract question submitted to us in this case, whether the Dominion Controverted Elections Act of 1874 is *ultra vires* or not, I am of opinion that the said Act is not *ultra vires*. This question has been so fully and ably discussed, not only by my brother judges who have just delivered their opinions, but also in the Provincial Courts by so many of the learned judges thereof, that any attempt on my part to review all the points raised in the different causes where the question has been mooted, would not, I feel, throw any new light on the subject, and could not but be as tedious as of doubtful usefulness. I will therefore give, as briefly as possible, the reasons upon which I base my opinion that the said Dominion Controverted Elections Act of 1874 is constitutional.

It is admitted, and is beyond doubt, that the Parliament of Canada has the exclusive power of legislation over Dominion controverted elections. By the *lex Parliamentaria*, as well as by the 41st, 91st and 92nd sections of the B. N. A. Act, this power is as complete as if it was specially and by name contained in the enumeration of the federal powers of sect. 91, just as promissory notes, insolvency, etc., are. It is also admitted that if this Act of 1874, like the one of 1873, has created a new Dominion Court in each Province for the trial of controverted elections, its legality is unimpeachable. The learned Chief Justice of the Superior Court of the Province of Quebec, whose judgment is now submitted to us, has declared the Act constitutional, and within the powers of the Dominion Parliament, chiefly, as it appears to me, upon the ground that such a new Dominion Court is virtually created thereby. The Appellant contends that such is not the case, and that it is upon the Provincial Superior Courts, as they are established, that this Act imposes the duties of trying the Dominion controverted elections. He contends that Parliament had not the power to do this, and has thereby encroached upon the privileges of the Provincial Legislatures, to whom alone, he alleges, is given, by the B. N. A. Act, the right to legislate upon the administration of justice, and the constitution, maintenance and organization of Provincial Courts. I will not consider whether or not the Controverted Elections Act creates a new court in each Province for the

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trial of election petitions ; for me, the question is of no importance, as I am of opinion that Parliament had the right to impose this duty upon the Provincial Courts as they exist. I say that if it has created new courts, the Act is constitutional, and this is admitted ; but I go further, and I distinctly base my judgment on the question upon this broader ground, that admitting, for the sake of argument, that it has not created new courts, but has given these trials to the Provincial Courts, as they are constituted, it had the power to do so.

Great stress is laid by the Appellant, in support of his contention, on the 101st section of the B. N. A. Act, by which the Dominion power is authorized to create additional courts for the better administration of the laws of the Dominion. But I do not see how that clause can be construed as restricting in any way the rights which the Dominion power has under the other parts of the Act. This right to create courts, it seems to me, is only a discretionary power, to be exercised when thought needful or necessary, but not at all obligatory on the Dominion. It does not follow that because it has the right to create new courts, it cannot have resort to the courts already established, for the execution of its laws. The Dominion, from 1867 to 1875, did not exercise that power, except in 1873, as regards controverted elections. Yet, can it be pretended, that from 1867 to 1875 there were no tribunals to execute each and every one of the Dominion laws ? I venture to think, that if the Imperial authority had had the intention to free the local courts from all federal authority in the manner contended for by the Appellant, they would not have left the Dominion for a single instant without its tribunals, and would have created federal courts by the B. N. A. Act itself, or they would, at least, have commanded the creation of these courts, and not left it as a mere discretionary power. I do not see more force in the Appellant's contention that because, in 1873, Parliament created a special tribunal for the trial of election petitions, it has granted that such a course was necessary, and admitted that it had not the right to impose this duty on the Provincial Courts. This, it seems to me, is not an argument at all on the question. First, I do not see such an admission in the fact of creating a new court. It might do so, without admitting that it was obliged to do so, and then, admitting that there was such an admission, supposing the admission, even to have been in clear and unequivocal terms, I do not see what effect it could have on my judgment in this case. An interpreta-

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tion by the Parliament of Canada of the B. N. A. Act is surely not binding on this, or on any court of justice. It is for the judicial power to decide whether the interpretation put on the Constitutional Act by either the Parliament of the Dominion or the Legislatures of the Provinces is correct or not, and it is so whether they read the law as granting them a right, or read it as refusing them such a right. I do not see how a court of justice can admit its right to say that the Parliament was wrong in assuming a certain power, and at the same time draw an inference that the Parliament had not this or any other power, simply because it denied to itself that power. In either case, whether the Parliament was right or wrong is to be decided by the courts of justice.

Now, as to the question itself :

In my opinion, for the administration of its laws, Parliament can either have recourse to the Provincial Courts already in existence, or create new courts, as it chooses. But, says the Appellant, the administration of justice, including the constitution, maintenance and organization of Provincial Courts, in virtue of section 92, sub-section 14, of the B. N. A. Act, is vested in the exclusive powers of the Provincial Legislatures, and under that section the Dominion Parliament cannot in any way increase or decrease, give or take away from, or in any manner interfere with the jurisdiction of the Provincial Courts. This, in my opinion, is a radically and entirely false and erroneous interpretation of this sub-section 14 of section 92 of the Act, and I think that it is an interpretation altogether opposed to the other parts as well as to the spirit of the Act, and which, if it was to prevail, would lead to serious consequences. I think that to decide that the Federal Parliament can never or in any way add to or take from the jurisdiction of the Provincial Courts, would be curtailing its power to an extent, perhaps, not thought of by the Appellant, and that it would destroy, in a very large measure, the rights and privileges which are given to the federal power by sections 91 and 101 of the Act. I take, for one instance, the criminal law. The constitution, maintenance and organization of Provincial Courts of criminal jurisdiction is given to the Provincial Legislatures, as well as the constitution, maintenance and organization of courts of civil jurisdiction, yet, cannot Parliament, in virtue of section 101 of the Act, create new courts of criminal jurisdiction, and enact that all crimes, all offences, shall be tried exclusively before these new courts? I take this to be beyond controversy.

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Yet, would not that be altering, diminishing, in fact, taking away all the Provincial Criminal Court's jurisdiction?

Could not the Parliament, as it has done, declare that such and such offences shall be triable before the Courts of Quarter Sessions, or that such and such offences shall be triable only before the Superior Courts of Criminal Jurisdiction? Can it not alter these laws and say, for instance, no larceny under ten pounds shall be tried at Quarter Sessions? Is this mere procedure? Does not that affect the jurisdiction of the courts? Cannot Parliament, as it has done, authorize, in certain cases, a change of venue, and say, for instance, that an offence otherwise triable at Quebec shall be tried at Montreal? How to do so, is procedure, but the change of venue itself, the taking away from one court the right it had to try such offence, the giving to another court the right to try such offence, does not that affect jurisdiction? Cannot Parliament enact that such an offence heretofore indictable shall hereafter be tried under the Magistrate's summary jurisdiction? or take away from the Magistrate's jurisdiction whatever offence it pleases? Surely all this would affect jurisdiction. Yet, I think that Parliament has the right to so legislate and order; and, as it has been remarked by Mr. Justice Johnston, in *Ryan v. Devlin* (1), the Parliament can add a new offence to the criminal laws, and leave the trial of it to the Provincial Courts. It has done so by the Post-Office Acts, by the Banking Acts, by the Railway and Customs Acts, by the *Blake* Act, by the Criminal Acts of 1869, and various other Acts, and it had the right to do so. It had the right, and it has done so, to make corrupt practices, under the Election Act, indictable offences, and to enact that such offences should not be triable at Quarter Sessions. It may amend all these laws, and, for instance, say that such corrupt practices shall be triable at Quarter Sessions. But, says the Appellant, Parliament has all these powers because it has complete and exclusive jurisdiction over criminal law and procedure in criminal matters. But, may I ask him, is not its jurisdiction over the House of Commons' controverted elections and all proceedings incident thereto as complete and exclusive? And, if I pass to the civil laws, that is to say other laws than the criminal laws, I see in the B. N. A. Act many instances where Parliament can alter the jurisdiction of the Provincial Civil Courts. For instance, I am of opinion that Parliament can take away from

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the Provincial Courts all jurisdiction over bankruptcy and insolvency, and give that jurisdiction to Bankruptcy Courts established by such Parliament. I also think it clear, that Parliament can say, for instance, that all judicial proceedings on promissory notes and bills of exchange shall be taken before the Exchequer Court or before any other Federal Court. This would be certainly interfering with the jurisdiction of the Provincial Courts. But I hold that, it has the power to do so *quoad all matters within its authority*. So it has the power, and it has done so by the Public Works Acts, to enact that the moneys due on expropriations by the Crown shall be deposited in the Provincial Courts, and to order and to regulate how these courts are to distribute such moneys. I read sub-sect. 14 of sect. 92 of the B. N. A. Act as having no bearing on the jurisdiction of the courts in the matters not left to the Provincial Legislatures. Strictly speaking, and read by itself, without reference to the other parts of the Act, it may not clearly be so restricted, but if the Appellant's contention was to prevail and his interpretation received, the powers of the Federal Parliament under sections 41, 91, 101 and others of the Act, would not be so complete as, I believe, the Imperial authority has intended them to be. The authority of the Federal power, it seems to me, over the matters left under its control is exclusive, full and absolute, whilst, as regards, at least, some of the matters left to the Provincial Legislatures by sect. 92, the authority of these Legislatures cannot be construed to be as full and exclusive, when by such construction the federal power over matters specially left under its control would be lessened, restrained or impaired. For example, civil rights, by the letter of sub-sect. 13 of sect. 92, are put under the exclusive power of the Local Legislatures, yet this cannot be construed to mean "all civil rights," but only those which are not put under the federal authority by the other parts of the Act.

So, the administration of justice is given to the Provinces, it is true, but that cannot be understood to mean all and everything concerning the administration of justice. Parliament, for instance, has the right, as I have said, to establish a Bankruptcy Court for a Province, yet, that would concern the administration of justice in such Province.

If, for instance, this Controverted Elections Act had been passed before Confederation—if, when the Confederation Act came into force, the courts had had the trial of the House of Commons' elections, can it be pretended that Parliament would not have the

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power to take away that jurisdiction from the Provincial Courts and give it to the House of Commons itself, or to any special court created under sect. 101 of the Act? Yet, would that not be interfering with the administration of justice, or with the courts in the Provinces? Certainly, it would. But, *quoad* a matter put under its authority, and in that way, Parliament has such a right. And sect. 129 of the B. N. A. Act puts it beyond doubt, in my opinion, when it says that all courts of civil and criminal jurisdiction in Ontario, Quebec, Nova Scotia and New Brunswick, existing at the union, can be abolished or altered by the Parliament of Canada or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature, under the Act.

The clause, it is true, says "except as otherwise provided by this Act," but I fail to see where it is otherwise provided by the Act so as to affect the question now before us. A distinction is made by the Appellant, which seems to me to arise from a confusion or misconstruction of terms. The learned Chief Justice, whose judgment is now before this court, is of opinion, that had the House of Commons simply resigned its jurisdiction over controverted elections, without substituting any court in its place for trying such elections, the Civil Courts would have been *de facto* invested with complete jurisdiction over these election petitions. I entirely agree with this opinion. The Superior Court for the Province of Quebec, for instance, having superior original jurisdiction over all civil pleas, causes and matters (1), would have had in that case to try these petitions. "But," says the Appellant, "that could not be, because the right to sit in the House of Commons is a political right; it is not a civil right; it does not fall under civil law." The answer to this is, it seems to me, easily found. The Quebec Statute does not say that the Superior Court has jurisdiction only in matters falling under the civil law, but it says that it has jurisdiction over all civil pleas, causes and matters *whatsoever*, using clearly, as well remarked by Chief Justice Meredith in this case, the terms "civil pleas, causes and matters," in contradistinction with criminal pleas, causes and matters.

It can surely not be pretended that an election petition is a criminal plea, cause or matter. Then, it is a civil plea, cause or matter. It must be the one or the other. I do not see why the Appellant speaks of civil law. He cannot find that word once in

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(1) Con. Stat. L. C. cap. 78.

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sect. 92 of the B. N. A. Act, defining the powers of the Provincial Legislatures. I doubt if it can be found in the whole Act. Civil rights is the term used. Well, civil rights, sometimes with us called the liberties of the subject; do not all arise from the civil law. For instance, the right of the subject accused of a crime to be tried by his peers is a civil right, yet the exercise of that right falls under the criminal, not the civil law. So, a political right, whatever the Appellant means by these words, is a civil right, though not an ordinary civil right. It is a civil right, springing from the public or the constitutional law.

The civil law does not include all the civil rights of the subject, whilst the civil rights of a subject include, among others, the civil law, the right to be governed by that law. But, enough about civil rights and civil law; they have, it seems to me, very little to do with the case supposed, which, I take it, depends on what is meant by the civil jurisdiction of the Superior Court. Now, I repeat it, when the Quebec Statute gives jurisdiction to the Superior Court over all civil pleas, causes and matters *whatsoever*, it intends to give it jurisdiction over all cases where the means taken to recover or obtain justice is not a criminal proceeding, or a procedure under the criminal law of the land. And, I say it again, an election petition is not such a criminal law proceeding. It seems, therefore, to me clear that, had Parliament abandoned its privileges over controverted elections, without referring them specially to any court, they would have fallen on the civil courts of ordinary jurisdiction, because the trial of a political right on an election petition is a civil plea, cause or matter, just as much as the trial on a controverted municipal election, for instance; for a municipal election, like an election for the House of Commons, is not a part of the civil law.

By renouncing its privileges over the controverted elections of its members, which, it is granted, they had a right to do, the House of Commons has made of election petitions, and of the trial of these controverted elections, an ordinary civil plea, cause or matter, which it would always have been had it not been for these privileges. The Appellant sees another objection to the proposition, that, without special legislation, upon the mere giving up of these privileges by the House of Commons, the Civil Courts would have had to try the election petitions. He says that it would have been impossible for the courts of justice in that case to execute their judgments. That does not seem to me to be an argument. If the



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House of Commons, even now, chose to disobey a judgment of an Election Court, I do not see how the court could enforce its judgment; of course, it cannot be presumed that the House of Commons will act against the law, but the presumption would have been the same, for what would, in that case, have been the law?

The last contention of the Appellant is based upon the words of sub-section 14 of the 92nd section of the B. N. A. Act, which give to the Provincial Legislatures the exclusive control over procedure in civil matters in the Provincial Courts. Upon this, I have nothing to add to what has been said in this case by the learned Chief Justice of the Quebec Superior Court, who held that these words must be understood to mean procedure in civil matters *within the powers of the Provincial Legislatures*. Section 41 of the Act specially gives to the federal authority the right to legislate upon the controverted elections of the House of Commons, and the *proceedings incident thereto*. Thus, the laws made by Parliament on the proceedings on election petitions are binding on the Provincial Courts. They cannot be deemed to be an interference with the powers of the Provincial Legislatures, since these Legislatures have no power, no control over these proceedings, or the procedure on these petitions.

For all these reasons, I am of opinion that the judgment appealed from, declaring the Controverted Elections Act of 1874 constitutional, is right, and that this appeal must be dismissed with costs. I need hardly say that if, in my remarks, I appear to have had the Province of Quebec more particularly in view, it is because the case submitted to us comes from that Province, but my remarks on the B. N. A. Act must be taken as applying generally to all the Provinces.

I have only one word to add. It has been said, that if this Act is constitutional, the control of the Local Legislatures over the Provincial Courts is reduced to a very small compass. Well, in the first place, I do not think so; then, I may call the attention of those who should be inclined to think too much of the powers of the Local Legislatures, under our Constitutional Act, over the Courts of Justice, to the fact that, by simply refusing to name and pay the judges, the federal authority can, when it pleases, virtually abolish any of the Superior Courts in any of the Provinces, or can control any changes in the constitution and organization of these courts which the Local Legislatures would be inclined to enact as regards the number of their judges. Yet, by the strict letter of

sub-sect. 14 of sect. 92 of the B. N. A. Act, the constitution and organization of these courts is put under the exclusive power of these Local Legislatures. This, again, shews that this clause cannot be read by itself, and that, for a sound interpretation of its terms, the whole Act must be taken into consideration.

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I concur in the opinion of the learned Chief Justice Meredith, to the effect that the 13th and 48th sections of the Act constitute the court for the trial of election petitions a separate and distinct court from the courts of superior jurisdiction in the Provinces. The 67th section of the Act supports this view, and by force of the 3rd section, which declares that in the Act, and for the purposes thereof, the expression "the court" shall mean, not only the courts of superior jurisdiction after-named, but also "any of the judges thereof," whenever a judge sits in a matter arising under the Act, he sits as a Court constituted by the Act; but it is by no means necessary, as it appears to me, for the determination of this case, that these points should be established so to be.

It cannot, in my opinion, admit of a doubt, that the Dominion Parliament can, in respect of all matters within their control, impose judicial duties upon the judges of the Superior Courts in the several Provinces in excess of those exercised by them in the discharge of their ordinary functions, and their so doing constitutes no invasion of the rights of the Local Legislatures.

I am of opinion, also, that it is incorrect to speak of the transfer by the Dominion Parliament of the right to hear and determine all questions arising upon election petitions to the courts of superior original civil jurisdiction, existing in the several Provinces, as constituting an enlargement of the jurisdiction of those courts, in the sense of being an interference with the special jurisdiction given by the B. N. A. Act to the Local Legislatures to constitute and organize Provincial Courts. Such transfer is but the adding an additional subject to those entertained by the courts in the exercise of their ordinary jurisdiction, and which subject, the exclusive jurisdiction of the House of Commons over it being removed, fell naturally within the competency of courts of superior and original civil jurisdiction to entertain, from the very nature of their institution as courts of original jurisdiction. And, finally, I am of opinion that the prescribing the manner in which the jurisdiction so transferred shall be exercised, that is to say, prescribing the

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procedure to be adopted, constitutes no invasion of, nor any interference whatever with, the powers and jurisdiction conferred by the B. N. A. Act upon the Local Legislatures.

Upon these latter points I should not have thought it necessary to add anything to what fell from me in the *Niagara case*, in the Court of Common Pleas, in Ontario (1), if it was not for the disapproval of that judgment expressed by several of the learned judges in the other Provinces, before whom the same question has arisen. The objections urged to that judgment are, that the trial of an election petition is not a civil matter at all; that the rights thereby brought in question are not civil rights at all; that, in contradistinction, they are purely political rights and matters; that the Courts of superior original civil jurisdiction, even in England would not have competency to entertain or assume jurisdiction in these matters, as was suggested in the judgment they would have, if the Parliament had passed an Act merely abandoning, on behalf of the House of Commons, the exclusive jurisdiction it had asserted and maintained over the subject-matter.

With the greatest respect for the opinions of those learned judges with whom I have the misfortune to differ, I am unable to see that a right is less a civil right because it is connected with that particular part of our civil polity which relates to the protection of the citizen in his rights arising out of our system of parliamentary representation. "The right to offer oneself as a candidate—the right to be placed on the voters' list—the right to vote—the right, in fact, to enjoy political rights," are all admitted, in one of the judgments to which I refer, to be civil rights, and so, I presume, the wrongful assertion of, or the interference with the rightful exercise of, any of these rights is a civil wrong.

If the right to offer oneself as a candidate be a civil right, the right of a qualified candidate to exclude a disqualified one must surely be equally so, and so must, likewise, be the right to exclude a person from voting who has not the legal qualification, or, having it, has corruptly sold it. For my part, I cannot permit myself to doubt that to return, as elected, a person not qualified by law, or who has not, in fact, had a majority of legal votes, is a civil wrong, or that, *converso*, the right of a legally qualified candidate to enjoy the fruits of his candidature and to take the position to which he has been legally elected, and to call in question all illegal

votes, and to exclude from the position to which he has legally been elected a person who has wrongfully been returned as elected, is a civil right ; and these are the rights which form the subject of enquiry upon an election petition. But it is said that we are concluded by authority, and that the Privy Council in England, by their judgment in *Théberge v. Landry*, (1), has clearly and fully pronounced these rights to be political and not civil.

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There is nothing in that case, in my judgment, to support this contention. The question there was, whether the Quebec Controverted Elections Acts of 1872 and 1875, which enacted that judgment upon the trial of controverted elections rendered by the authorities to which those Acts transferred the right of trying such cases should not be susceptible of appeal, ousted the prerogative jurisdiction of the Privy Council in appeal. And the court held that the appeal was well taken away, upon the ground that, as these Acts dealt not with mere ordinary civil rights and privileges, but with rights and privileges of a peculiar character, namely, the rights and privileges not only of candidates, but of electors and of members of the Legislative Assembly, which rights have always, in every colony, following the example of the mother country, been jealously guarded by the Legislative Assembly in complete independence of the Crown, it was quite competent for the Legislature to delegate the authority formerly exclusively exercised by the Legislative Assembly to Her Majesty's courts of civil jurisdiction, or to any of the judges thereof, to the exclusion of all appeal to the Crown in Council, the court saying :

“ It would be singular if the determination of these cases in the last resort should no longer belong to the Legislative Assembly, nor to the court which the Legislative Assembly had put in its place, but belonged to the Crown in Council.”

There is not a word here about the rights dealt with not being “ civil rights,” nor anything from which it can be collected that the Privy Council was of opinion they were not. There is no contrast whatever made or alluded to, as between “ civil ” and “ political ” rights, but there is, as it appears to me, a contrast plainly enough drawn between mere ordinary civil rights, as to which a question could fairly arise as to the power of a Provincial Legislature to exclude the right of appeal, and those peculiar civil rights over which the Legislative Assembly, in imitation of the British House of

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Commons, has asserted and maintained exclusive control in complete independence of the Crown, which exclusive control it was held to be competent for the Legislature to delegate, and to assert for the substituted authority equal independence of the Crown.

The Parliament, having transferred this subject, over which the House of Commons formerly exercised exclusive control, to the cognizance of civil tribunals, seem to me, if it were necessary to appeal to such an argument, to indicate that they entertained no doubt that the rights over which control was so transferred were civil rights ; for it is the pride of our constitution to keep our civil courts, and the judges thereof, aloof from all interference in political subjects and discussions, and it is scarcely to be conceived that the Parliament would transfer the investigation of those rights from the political to a civil tribunal, if it had thought that the subject-matter placed under the cognizance of the civil tribunal did not involve any enquiry into civil rights.

In support of the proposition, that courts of original jurisdiction, even those courts in England, could not assume or exercise jurisdiction over the rights in question, even though Parliament should, by an Act of Parliament, merely abandon and disavow all exclusive and every jurisdiction of the House of Commons over the subject matter, Rowland's Manual of the Constitution has been referred to. The following extract, however, from that work, in which the author gives an account of the manner in which the exclusive control of the House of Commons was assumed, asserted and vindicated, until it became embodied in the constitution, seems to me to lead rather to a contrary conclusion. He says at pp. 203-5 :

"The power to decide in controverted elections was exercised by the Crown up to the reign of James First. In his first Parliament the Commons entered into a contest with him, asserting their own right to decide upon election returns. James convoked the Parliament by a royal proclamation, in which he admonished the electors that the knights for the counties should be selected out of the principal knights or gentlemen of sufficient ability, and for burgesses that choice be made of men of sufficiency and discretion. He commanded that express care be taken that there be not chosen any bankrupts or outlawed, but such only as were taxed to the subsidies and had ordinarily paid and satisfied them ; that sheriffs do not direct any precepts to ruined and decayed boroughs, and that the inhabitants of cities and boroughs do not seal any blanks, leaving to others to insert the names, but do make open and free elections according to

law. He notified that all returns should be brought into Chancery, there to be filed of record, and if any be found contrary to the proclamation they were to be rejected as unlawful and insufficient, and the city or borough was to be fined for the same; and if it be found that they had committed any gross or wilful default or contempt in their election return or certificate, that then their liberties were to be seized into his hands and forfeited. If any person take upon himself the place of a knight, citizen or burgess, not being duly elected, returned and sworn, then every person so offending to be fined and imprisoned for the same.

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"The Commons lost no time after the meeting of Parliament in questioning the right assumed by the King in his proclamation to have the returns of members decided in Chancery.

"Sir Francis Goodwin was elected for Bucks, but his return was refused by the Clerk of the Crown because he was outlawed. On a second election Sir J. Fortescue was elected. A motion was made in the House that a return be examined and Goodwin be received as member. The Clerk of the Crown attended at the bar by order of the House with the return, and the House resolved, after debate, that Goodwin was lawfully elected and returned. The Clerk of the Crown was ordered to file the first return, and Goodwin took the oath of supremacy and his seat.

"The Lords desired a conference which the Commons declined, and sent a message that in no sort should they give account to the Lords of their proceedings.

"The Lords replied that, acquainting His Majesty with the return, His Highness conceived himself engaged and touched in honour that there might be some conference of it between the two Houses. Upon this message, so extraordinary and unexpected, the House appointed a committee to consider what should be delivered to His Majesty, and through the Speaker, the House represented to the King that the Sheriff was no judge of the outlawry, neither could take notice it was the same man, and, therefore, could not properly return him outlawed. The King reminded the Commons that he had no purpose to impeach their privilege. The difficulty was, after considerable discussion, solved, on a conference held in the King's presence, and by his command, with the judges, who, conceding that the Commons was a Court of Record and judge of returns, although not exclusively of the Chancery, suggested that both Goodwin and Fortescue should be set aside, and a new writ be issued.

"This compromise was joyfully accepted by the Commons, and no

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attempt was afterwards made to dispute their exclusive jurisdiction over the returns of their members."

Now, the House of Commons, having in this manner, as a Court of Record, and as a compromise with the King's courts, acquired the jurisdiction it assumed, until in 1770, by the Grenville Act, the jurisdiction was conferred by the Legislature upon a committee of 11 members, can it be doubted that, if the British Parliament should pass an Act of Parliament, whereby, upon behalf of and in the name of the House of Commons, it should abandon, abjure and disavow all further control over the return of its members, the right to enquire into those returns would revert to the King's courts?

With great deference, I think there can be no doubt that it would, and I am of opinion that, under a like Act of the Dominion Parliament, the courts of superior original jurisdiction in the several Provinces of the Dominion would, from the nature of their institution as courts of original jurisdiction, have the like power, and therefore these Courts had competency to accept cognizance of the matter.

In fine, I entertain no doubt that the right to enquire into the legality of the returns of members of the House of Commons, not relating to a matter over which any jurisdiction is conferred upon the Local Legislatures, but to civil rights which, by the constitution, were wholly under the exclusive jurisdiction of the House of Commons, it was competent for Parliament to transfer to the civil tribunals in the several Provinces, having superior original jurisdiction, cognizance of all rights arising out of election petitions, and that so doing constitutes no invasion of, or encroachment whatever upon, the rights conferred upon the Local Legislatures, and that, inasmuch as Parliament may transfer such cognizance absolutely, it may do so qualifiedly, or *sub modo*, by defining the mode in which the cognizance shall be exercised, which, by prescribing the mode of procedure, is what has been done. Neither is such prescribing of the mode of procedure an invasion of, or encroachment upon, the rights of the Local Legislatures, for the 14th sub-section of sect. 92 of the B. N. A. Act must plainly be read as conferring upon the Local Legislatures the right to prescribe procedure in civil matters, only in respect of these matters which, by the 13th sub-section, were placed under the exclusive control of the Local Legislatures.

To hold that the Local Legislatures could prescribe, or in any respect interfere with, the *manner* in which a *matter* over which they have no jurisdiction whatever shall be conducted or enquired

into, involves, in my opinion, a manifest contradiction in terms. I am of opinion, therefore, that the Act is not in any particular *ultra vires*, and that the appeal, which calls in question its validity, should be dismissed with costs.

*Appeal dismissed with costs.*

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#### JUDGMENT IN SUPERIOR COURT.

[*Reported 5 Q. L. R. 1.*]

MEREDITH, C. J. :—

The main question as submitted at the argument in this case, is as to whether the court can legally discharge the duties assigned to it by the Dominion Controverted Elections Act, 1874. The answer to that question must depend upon the right of the Dominion Parliament to legislate on the subject, and upon the extent of the powers of this court considered in relation to the duties thus assigned to it.

The authority of the Parliament of Canada to make laws for the trial of controverted elections for the House of Commons is beyond doubt. That subject, not being one of those placed by the Act of Confederation within the exclusive power of the Provincial Legislatures, is, therefore, within the general powers of the Dominion Parliament. Moreover, the 41st section of the Act of Confederation clearly admits that that subject is within the powers of the Dominion Parliament; and from its nature, it could not be otherwise. It is also plain that under section 101 of the Confederation Act, the Parliament of Canada had power to create a court, or courts, for the trial of controverted elections; and, although it may not be equally plain, I am of opinion that the Dominion Parliament did exercise that power, by the Dominion Controverted Elections Act, 1874, and that, under section 48 of that law, the trial of election petitions must take place before Dominion Courts, established for that purpose, to the exclusion of any Provincial Court. It is, nevertheless, true, that, by the Dominion statute already mentioned, it was intended that certain Provincial Courts, of which the Superior Court for Lower Canada is one, and each of the judges of those courts, should have concurrent powers with respect to the proceedings under that statute, preparatory to the actual trial of any election petition. It, therefore, becomes necessary to consider, what are the powers of this court with respect to the duties which it is thus required to discharge.



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As to that point, I may at once admit, although the admission by some may be deemed to go too far, that, in my opinion, the "constitution" of Provincial Courts, which is exclusively within the power of the Provincial Legislature, includes the power to determine the jurisdiction of those courts; and places that jurisdiction beyond the control of the Dominion Parliament.

If that opinion be well founded, then the powers of this court could not be enlarged by the Controverted Elections Act of 1874; and, therefore, according to my views, it becomes necessary to enquire what are the powers of this court according to its constitution.

On that subject I may quote the second section of the chapter 78 of the C. S. L. C., the provisions of which are (in substance) reproduced in different articles of our code of civil procedure; that section is as follows:

"The Superior Court has original civil jurisdiction throughout Lower Canada, with full power and authority to take cognizance of, hear, try and determine in the first instance, and in due course of law, *all civil pleas, causes, and matters whatsoever*, as well those in which the Crown may be a party as all others, excepting those purely of Admiralty jurisdiction, also those over which original jurisdiction is given to the Circuit Court."

This court having thus, in effect, civil jurisdiction throughout this Province to try and determine "*all civil matters*," subject to certain exceptions which do not affect this case, the question submitted seems to reduce itself to this, is the trial of a contested parliamentary election, a civil matter, within the meaning of the provision of law just quoted?

I put the question in this way, because I think that if this court is, according to its constitution, unable to hold *the trial*, it must be equally powerless to take cognizance of the proceedings of which I have spoken as preparatory to *the trial*.

As tending to shew that this court could not in the discharge of its ordinary powers decide a contested election, it has been contended, and is doubtless true, that the determination "of all matters affecting elections to the House of Commons (in England) had been early claimed as against the Crown and courts, and finally conceded to the House of Commons, as part of its inherent and undoubted privileges." And it is equally plain, that until the House of Commons of Canada consented to abandon the privilege in question, this court could not have attempted to interfere with its exercise.

But the House of Commons of Canada having relinquished the privilege of determining contested elections, one at least of the causes which prevented the civil courts from taking cognizance of such matters, has ceased to exist; and, in view of the new duties assigned to us, it becomes necessary to enquire whether independently of the powers intended to be given to this court by the Dominion Controverted Elections Act, 1874, the trial of a contested election is a "civil matter," within the meaning of the statute defining the powers of this court.

That question ought, I think, to be answered in the affirmative: the words "*civil matters*" in the statute regulating the powers of this court, being there used, as they generally are in such statutes in opposition to "*criminal matters*."

It may also be observed that the right of the House of Commons to determine all matters relating to the election of their own members, seems to have been claimed by, and conceded to them, because the civil courts were incompetent to deal with such matters; but because, from their nature, they were deemed more properly cognizable by the House itself; which certainly was true, as long as the courts were under the control of the Crown.

Not having access to the earlier works on the subject, I may refer to the quotations and observations in Chambers' Law of Elections under the head of Controverted Elections, as shewing how such matters were viewed and disposed of before the House of Commons established its exclusive right to try the election of its members.

Chambers begins by saying that there were only three or four election trials between the years 1265 and 1483; the fact being that but little importance was then attached to seats in the House of Commons. Chambers then refers to Prynne's Plea for the Lords, in which the jurisdiction as to controverted elections is said "to belong to the King and the Lords." And I find in the 6th State Trials, p. 1085, Prynne is cited, as saying, in his abridgment to the Records of the Tower: "The King and Lords were anciently sole judges of the legality of election of members of the House of Commons till the time of Henry VII."

Returning to Chambers, he cites authorities as shewing that controverted elections were decided "sometimes by Lords of Parliament, sometimes in Westminster Hall."

He then refers to the Devon petition which, in 1319, was referred to the Court of Exchequer; (1) and next to a writ, which in 1362,

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(1) See also Glanville's Election Cases, Preface.

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was addressed by the King, at the end of Parliament, to the sheriff, to enquire, in the *County Court*, who were returned, and on his neglect, to the justices to make inquisition.

I find, also, that Sir ROBERT ATKINS, in his judgment in the celebrated case of *Bernardistone v. Soame*, (1)—after referring to the statute of 11th Henry IV., cap. 1 (A.D. 1410), giving power to judges of assize to punish sheriffs making returns contrary to a former statute, and to inflict a penalty of £100 upon the sheriff, and to cause the knights unduly returned to lose their wages—observed, “all which depends upon the inquiry made by the judges of assize,” and the learned judge added, “at this time surely this matter of elections was not held so sacred and so incommunicable a thing, as some would have it now, for by this statute it is referred to the judges of the assize.”

Glanville (2) also says that: “In the latter end of the sixteenth and the beginning of the seventeenth centuries, this question was warmly agitated and contested between the Crown and the House of Commons. On the part of the Crown it was contended, that as the writ for election issued out of, and was returnable into, the Court of Chancery, the Lord Chancellor was the sole and proper judge of the due execution of the writ, consequently of the legal qualifications of the elected.

“On the other hand, it was insisted upon by the House of Commons, that the sole and exclusive right of determining upon cases concerning the election of their own members, was lodged in that House.”

And we know that that right was fully enjoyed by the House of Commons from the beginning of the seventeenth century until they voluntarily relinquished it in 1868.

I do not however find in any of the cases or authorities which I have had occasion to examine, anything tending to shew that if the House of Commons had not claimed the trial of controverted elections, as their exclusive privilege, such trials could not have taken place in the courts like other civil matters.

Indeed it seems to me beyond reasonable doubt, that such would have been the result, had it not been for the exclusive privilege claimed by the House of Commons.

That there would have been nothing incongruous in the trial of

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(1) 6 State Trials, 1031.

(2) Glanville's Election Cases, p. 9, Preface.

such matters by the civil courts, is sufficiently plain from the recent legislation on the subject as well in the mother country as here.

If the foregoing views be correct, it follows that when the House of Commons of Canada gave up the privilege of trying controverted elections, there could be no objection to a declaration by the Legislature that such trials should take place before the ordinary civil courts. The effect of such declaration being, as has been well shewn in the Niagara election case (2), not to enlarge the jurisdiction of those courts, but to add certain subjects to those upon which the already existing jurisdiction of the courts could be exercised.

In support of this view I may refer to the following observations made by the president of the Superior Court at Montreal (Mr. Justice JOHNSON), in *Ryan v. Devlin* (1): "Parliament could add a new offence to the criminal law, leaving the trial of it to the provincial criminal courts; and if so, why may it not denude itself of its exclusive jurisdiction as to the hearing and determination of controverted elections, and transfer those matters, and the *lex parliamenti* belonging to them, to the tribunals having general jurisdiction over civil rights in the respective Provinces."

And Mr. Justice GWYNNE, in the Niagara election case (2), after having said that the right to sit in the House of Commons is "*undoubtedly a civil right*," at a more advanced stage of his judgment added, "if an Act had been passed by the old Parliament of Canada resigning the jurisdiction of the Commons House of Assembly over the election of members for the House, without naming any court to which their jurisdiction should be transferred, there can be no doubt the superior courts of common law could have assumed jurisdiction in virtue of the rights and powers inherent in them as courts of original jurisdiction." This view was not questioned by the learned Chief Justice WILSON, who, as to another point, differed from the majority of the court, nor by Mr. Justice BRAUDRY, who differed from the majority of the court in *Ryan v. Devlin*, and in *Owen et al. v. Cushing*. On the contrary the learned Chief Justice gave his opinion as follows: "In submitting these contested elections to the provincial tribunals so far as relates to the Courts of Queen's Bench and Common Pleas, the Dominion Parliament has merely transferred certain civil rights, over which the Parliament had formerly exclusive jurisdiction, to the courts which had a general jurisdiction over all civil rights

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before the passing of the Act, or which have since acquired it, and the submission of that new subject, for the reasons before given, was not, and is not, an enlargement of the jurisdiction of these courts, simply because these courts had, at the time of the passing of that Act, a general jurisdiction in cases of like nature." And Mr. Justice BEAUDRY dissenting from the judgment of the court in *Ryan v. Deslin* observed: "Si donc la chambre des communes était disposée à renoncer au privilège de vérifier elle-même les pouvoirs de ses membres et de juger la contestation de leur élection *deux moyens se présentaient*, créer un tribunal à cet effet, et c'est là ce qui a été fait par l'acte de 1873, ou bien *laisser ses contestations suivre le cours ordinaire, et être déterminées par les cours qui avaient juridiction en semblable matière*," thus expressing, with great clearness, the doctrine above laid down by the learned judges in Ontario.

Indeed it seems to me that if after the passing of a statute simply putting an end to the jurisdiction of the House of Commons as to contested elections, a suit had been instituted, in this court, alleging an illegal return, tending to deprive the plaintiff not only of his seat, but of the privileges allowed within this Province to members of the House of Commons, it would have been impossible for the court to refuse redress, by examining into the validity of the election, and determining upon the right to the seat. A refusal to do so on the ground that the court had never before interfered in such matters, would be met by the answer that such interference was heretofore, not only unnecessary, but impossible, by reason of the exclusive jurisdiction of the House of Commons; but that the abolition of that jurisdiction, at the same time that it permitted the exercise of the powers of the civil courts, rendered the exercise of those powers absolutely necessary; and this in accordance with the maxim *ubi jus ibi remedium*.

It has, however, been very strenuously contended, that although it may be fitting that the rights resulting from an election, and the status of persons claiming to be members of the House of Commons, should be determined by this court, as the highest court having original civil jurisdiction throughout the Province; yet that this court could not in the exercise of its ordinary jurisdiction determine as to the right to a seat in a Parliament held in another Province; nor report to the Speaker, as required by sect. 30, with respect to corrupt practices on the part of candidates and others; and as to whether corrupt practices extensively prevailed at the

election. This objection would certainly call for serious consideration, if the duties to which it applies were, under the statute, required to be discharged by a Provincial Court, such as the Superior Court. But according to my view, the Superior Court, not only is not required to perform, but is not allowed to perform, the duties just mentioned.

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Here, and as bearing upon this part of the case, it may be well to refer to the provisions of the Dominion Controverted Elections Act, 1874, which establish by what courts and officers the duties imposed by the Act are to be discharged.

Section 3 declares, "in this Act and for the purposes thereof, the expression *the court* shall mean the courts hereinafter mentioned, or *any of the judges thereof*." In the French version, "*ou l'un de leurs juges*."

The declaration that the expression "the court" in the Act shall mean not only any one of certain courts, but also any *one* of the judges of such court, *ou l'un de leurs juges*, is very important; but, bearing in mind the time this case has already occupied, I shall not dwell upon it. Moreover, I believe it will be found that under the express words of the law, with one comparatively unimportant and probably unintentional exception (1), every duty before the trial, that can be performed by the court, can also be performed by a single judge out of court; in the same way, as under our law, a judge out of court has the same powers as the court itself, with respect to actions between lessors and lessees, the contestation of writs of *capias* and attachments, and as to prerogative writs, and various other matters.

I observe, however, that the learned Chief Justice of the Court of Common Pleas of Ontario has expressed himself as being of opinion that the words "*any of the judges thereof*," have reference to the Administration of Justice Act (of Ontario), passed more than a year before the Dominion Act in question; but when it is borne in mind that the Minister of Justice at the time of the passing of the statute in question, was one of the most distinguished members of the Bar of Lower Canada, and that he had a large share in the preparation of that measure, it seems to me more than probable that the words "*ou l'un de leurs juges*" are used in the statute in question in the same sense as they are used in the various provisions of our law to which I have alluded.

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(1) See sections 11 and 13.

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Coming now to the sections of the statute which relate to the trial, more particularly to sections 13 and 48, we find, that by section 13, it is declared that "every election shall be tried" by *one of the judges of the court without a jury*; and that by sect. 48, it is provided that "on the trial of an election petition and in other proceedings under this Act, the judge shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a judge of one of the Superior Courts of law or equity for the Province in which such election was held, sitting in term, or presiding at the trial of an ordinary civil suit, and the court held by him *for such trial shall be a Court of Record.*"

Under this clause the Trial Court is made a Court of Record; and the Court of Record so established by the Dominion Parliament must, I think, be held to be a Dominion Court, separate and distinct from any Provincial Court.

The report to the Speaker as to the result of the trial, and that required by sect. 30, are to be made, not by the Superior Court, but by the judge who held the Dominion Court established by sect. 48.

In a word, it seems to me, that as to the proceedings before the trial, subject to the exception already mentioned, each judge has a concurrent jurisdiction with the court of which he is a member; and, *as to the trial, and the reports to the Speaker*, no Provincial Court can in any way interfere. If this view be correct it furnishes an answer to the objection which I have just been considering, founded on the fact that the Parliament of Canada is held in another Province, and also on the nature of the reports to the Speaker, required to be made by the trial judge, and I think it ought also to be deemed of importance by those who hold that the statute of 1874, in so far as it attempts to enlarge the power of those courts, is *ultra vires*.

It may be true that the jurisdiction of the Provincial Court, of which I am a member, cannot be extended by the Dominion Parliament; but I am not aware that there is anything to prevent me, as a judge named by the Dominion Government, from discharging any duty assigned to me by the Dominion Parliament. As has been already mentioned, the framers of the statute of 1873 deemed it prudent to make the judges of the Superior Court a new Dominion Court, as to the powers of which there could be no difficulty. But I cannot see that any such proceeding was necessary, with respect to judicial powers intended to be given to the

judges separately, acting out of court, as I am now doing. If the Dominion Parliament, as was done by the Act of 1873, could make me a judge of another court, and then give me, out of court, the powers in question, I fail to see why the same Legislature could not confer upon me the same powers, without going through the form of creating a new Court.

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In short, I think that in the discharge of the duties in which I am now engaged, as a judge out of court, I am in the same position, as to my powers, as I would have been, in the discharge of the same duties, under the Act of 1873; and I deem it almost beyond doubt, that a judge holding a trial under sect. 48 of the Act of 1874, will, in principle, be in the same position as the judges were who held election courts under the Act of 1873.

A number of interesting American cases have been referred to as bearing on the subject; but I do not deem it necessary to dwell upon them, as I do not question the proposition they were intended to support, namely, that under the Act of Confederation, the Dominion Parliament cannot enlarge the jurisdiction of the Provincial Courts.

Our attention was also drawn to the observations of the Lords of the Privy Council in *Théberge v. Landry*, and more particularly to the following passage respecting our two Provincial statutes providing for the trial of contested elections for the House of Assembly: (1)

"These two Acts of Parliament, the Acts of 1872 and 1875, are Acts peculiar in their character. They are not Acts constituting or providing for the *decision of mere ordinary civil rights*; they are Acts creating an entirely new, and up to that time unknown, *jurisdiction in a particular court of the colony*, for the purpose of taking out, with its own consent, of the Legislative Assembly, and *vesting in that court*, that very peculiar jurisdiction, which, up to that time, had existed in the Legislative Assembly, of deciding election petitions and determining the status of those who claimed to be members of the Legislative Assembly."

The Provincial Act of 1872 certainly did create a new court; and therefore the jurisdiction conferred upon that court was a "new jurisdiction;" and it may be observed that, in the last paragraph but two of their judgment, their Lordships seem to speak of the Act of 1875 as creating a new tribunal. Now, if that Act did create



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a new tribunal, then the jurisdiction conferred upon that tribunal was also a new jurisdiction, and the observations of their Lordships, as to the jurisdiction exercised by such new tribunal, would not be applicable to the jurisdiction vested in this court, according to its original constitution.

Besides, it is to be recollected that the question which engaged the attention of their Lordships is wholly different from that now under our consideration.

The main question in this case is, as to the power of the *Dominion Parliament* to impose certain duties upon the Provincial Courts, and the judges thereof. But no such question was raised or could have arisen in *Théberge v. Landry*; the statutes spoken of by the Lords of the Privy Council in that case being Provincial statutes respecting Provincial Courts; there being no question as to the power of the Provincial Legislature to pass such statutes.

It was also contended that the Act of 1873 shews that Parliament thought the creation of a new court necessary. There cannot be any doubt that the framers of the Act of 1873 thought the creation of a new court, for the trial of election petitions, a wise precaution; and probably it was so, as tending to prevent controversy; but it does not follow that they deemed that precaution absolutely necessary; and the Act of 1874 shews that Parliament, upon further consideration, came to the conclusion that some of the duties connected with the trial of election petitions, could be assigned to the ordinary civil tribunals.

For these reasons, after giving to the subject the best consideration in my power, I am of opinion that this court has power to discharge the duties assigned to it by the Dominion Controverted Elections Act, 1874; and I am further of opinion, that my power, as a judge out of court, to discharge the duty in which I am now engaged, admits of less difficulty than the question as to the powers of the court.

I now pass to the consideration of the objection as to procedure, which was deemed insuperable by the late Mr. Justice Beaudry; and which seems to have been viewed in somewhat the same light by the Chief Justice of the Court of Common Pleas in Ontario. The objection, as I understand it, is, that notwithstanding the provision of the Imperial Act, declaring that the Provincial Legislature has exclusive power to legislate as to procedure in civil matters, in Provincial Courts, the Dominion Parliament, by the statute impugned, has declared what shall be, from the beginning

to the end, the procedure in this *Provincial Court* in the *civil matter* in which we are now engaged.

That this is a weighty objection, cannot, I think, be denied ; and the judges of the Courts of Queen's Bench and Common Pleas in Ontario, have met it by an order declaring in effect that the procedure in the Dominion Controverted Elections Act, 1874, and in any other Act of the Dominion Parliament, relating to Dominion controverted elections, or to corrupt or other illegal practices, at such elections, etc., shall be the course of procedure in such cases in the said Ontario Courts, "in all respects as if the said procedure had been and was, and it now is, specially provided for, prescribed, and regulated, by the said courts, and by each of them, in the like manner and to the like tenor and effect as the said procedure, in such cases, is prescribed and enacted by the said respective Acts."

I need hardly say that I entertain no doubt as to the power of the Ontario judges to make the order just alluded to, but I do not think it by any means certain that we could, under our system of law, pursue the same course. The first proceeding to be adopted, that of summoning the member returned or other defendant, would present a difficulty. We are (art. 129 C. P.) prohibited from making any rules of practice inconsistent with our code of procedure, and by article 43 of that code it is declared that "every action before the Superior Court is instituted by means of a writ of summons, in the name of the Sovereign ; saving the exceptions contained in this code and other cases provided for by special laws." In view of this article, I do not see how the defendant in an election petition could be required to appear as provided by the Dominion Controverted Elections Act, 1874 ; or otherwise than by a writ of summons in the name of the Sovereign. Many other difficulties of a like nature would also probably occur. But, be that as it may, we have not, and are not likely to have, an order such as has been made in Ontario ; it therefore becomes necessary to consider whether the objection as to procedure is as formidable as it, at first sight, appears to be ; and I must admit that, according to the strict letter of the statute, the objection can hardly be answered, in so far as regards any proceedings *necessarily before the Superior Court*.

In order, however, to arrive at the true meaning of the section in question respecting procedure in civil matters in the Provincial Courts, it is necessary to recollect that although very much the greater part of the civil matters, in the Provincial Courts, are

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matters completely within the powers of the Provincial Legislatures, yet that there are some of these matters, for instance the present matter, and I think I may add matters in insolvency, wholly beyond the powers of the Provincial Legislature; and bearing this in mind, I think the provision of the Imperial Act, giving the Provincial Legislature exclusive power to make laws respecting proceedings in "civil matters" in Provincial Courts may from the nature of the subject, be understood as meaning "civil matters" *within the power of those Legislatures*; and not as giving, as is contended, to the Provincial Legislatures power to establish the procedure in *civil matters*, in other respects utterly beyond their power, and completely under the control of the Dominion Parliament.

Now, if the exclusive power of the Provincial Legislatures, as to the regulation of *procedure* does not extend to matters as to which, in other respects, they have no control, and which in no respect concern them; then such matters, even as to procedure, would be within the general powers of the Dominion Parliament, and the difficulty as to procedure would disappear. This seems to be the view of the matter taken by Mr. Justice Gwynne, who is reported to have said: "Much was said about the constitution, maintenance, and organization of our courts being exclusively under the control of the Provincial Legislature. These latter words in the 14th paragraph of the 92nd section of the B. N. A. Act plainly apply to the procedure in *civil matters*, over which the preceding paragraph gave the Provincial Legislature exclusive control."

I may add that if, as I have attempted to shew, the election trial does not take place before a Provincial Court, but before a Dominion Court; and that the intervention of a Provincial Court is not required, at the most, on more than one occasion during the preliminary proceedings (that is, for the fixing of the time and place of the trial, as to which no special procedure is ordered) then the objection, as to procedure, will lose much of the importance which, at first sight, seems to attach to it.

Upon the whole, although these matters have presented, and still present grave difficulties to my mind; and although in relation to them, I have the misfortune to differ from judges for whose opinions I have the highest respect; and although I must admit that some of the considerations which I deem of importance, are not relied on by the learned judges in whose conclusions I concur; I, nevertheless, think I see my way to discharge, and therefore

shall endeavour to discharge, the duties assigned to me by the Dominion Controverted Elections Act, 1874 ; and I have the less hesitation in adopting that course, when I bear in mind, that the objections raised in this cause, were, in the course of an able and exhaustive judgment, declared unfounded more than three years ago by the Court of Review at Montreal (1), and that the judgment so rendered has never been questioned, either by the authorities of the Dominion, or of the Province—also, that learned and elaborate judgments, to the same effect, have since been rendered by the Court of Common Pleas, at Toronto ; and by the Superior Court for this Province at St. Hyacinthe and Sorel ; and that, when not a month ago, a motion to appeal from the last mentioned judgment was made before the Court of Appeals at Montreal (2), Sir Antoine A. Dorion, as president of the court, speaking with reference to the right of the Dominion Parliament to impose the duty of trying federal elections upon Provincial Courts, observed : “ We hold that they can, in matters within their sphere, impose duties upon any subjects of the Dominion, whether they be officials of Provincial Courts, other officials, or private citizens ”—and in fine when I bear in mind that long after the decisions of the Court of Review, at Montreal, were not only rendered, but reported, the Supreme Court, at Ottawa, deprived the Honourable Mr. Langevin of his seat in the House of Commons, and condemned him to pay heavy costs, upon proceedings taken under the authority of the statute, now impugned as being unconstitutional.

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It has however been very strenuously contended, that as the constitutionality of the statute of 1874, was not questioned in Mr. Langevin's case, the judges of the Supreme Court could not avoid giving effect to that law, even if they had deemed it unconstitutional.

To that view, I must say, I am altogether opposed ; as well upon the ground of authority, as upon principle.

An eminent American writer on public law has said : “ There is no position which depends upon clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void ”—the author does not say voidable, but void—and he adds, “ no legislative act, therefore, contrary to the constitution can be valid.” (3)

(1) See *Ryan v. Devlin*, 20 L. C. J. 77 ; *Owens v. Cushing*, 20 L. C. J. 86.

(2) *Bruneau v. Massue*, 23 L. C. J. 60.

(3) *Alexander Hamilton*, No. 48 of the *Federalist*.

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Chief Justice Marshall, than whom a higher authority cannot be cited, in the case of *Marbury v. Madison*, speaks of "Legislative acts contrary to the constitution," as *not being law* (1), and Chief Justice Ritchie, in *The Queen v. Chandler, in re Hazelton* (2), speaking of Legislatures with limited powers, observed, "and if they do legislate beyond their powers, or in defiance of the restrictions placed on them, their enactments are no more binding than rules or regulations promulgated by any other unauthorized body." (3)

To me it seems plain, that a statute, emanating from a Legislature not having power to pass it, is not law; and that it is as much the duty of a judge to disregard the provisions of such a statute, as it is his duty to obey the law of the land. As to the distinction between what is voidable, and what is void, I do not think that under our system, it is applicable to statutes; which must be either void, or valid; if void, they cannot be rendered more void, and if valid, they cannot be affected by any judicial authority.

*Preliminary objections dismissed with costs.*

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(1) 1 Cranch, 137. (2) 1 Hannay, 556.

(3) See *L'Union St. Jacques v. Belisle*, 20 L. C. J., p. 40; *ante* p. 63.

## [PRIVY COUNCIL.]

OCTAVE BOURGOIN AND OTHERS ..... *Appellants*,

\*J. C.

AND

1890

Feb. 12, 13, 14,  
17, 18, 26.

LA COMPAGNIE DU CHEMIN DE FER DE  
MONTREAL, OTTAWA ET OCCIDENTAL, THE  
ATTORNEY-GENERAL (Intervening Party),  
THE ATTORNEY-GENERAL (Opposant), LA  
COMPAGNIE DU CHEMIN DE FER DE MON-  
TREAL, OTTAWA ET OCCIDENTAL ..... } *Respondents*.

*Four Consolidated Appeals.*

*On appeal from the Court of Queen's Bench for the Province of Quebec,  
in the Dominion of Canada.*

[*Reported 5 App. Cas. 381.*]

A Provincial Legislature of Canada has no power to pass an Act transferring to a new Company, or otherwise, a federal railway with its appurtenances, property, rights and powers, or to dissolve a federal Company, or to substitute for it a Company to be governed by, and subject to, Provincial legislation.

Consolidated Appeal from four judgments of the Court of Queen's Bench, given upon four appeals from the Superior Court for Lower Canada, District of Montreal, numbered 18, 117, 141, and 144 respectively.

The appeal arose out of four actions, the first of which, No. 693, was brought in the Superior Court by the Respondent company against the four Appellants, and Damase Masson and others, who were parties *mis en cause* to the action. The second, No. 1,218, was brought in the same Court by the Appellants against the company.

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\* Present:—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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The third action arose out of the action No. 1,218, and was an appeal, distinguished as No. 117, from the decision of the Superior Court in that action, and was brought by David A. Ross, Attorney-General for [Lower]

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The fourth action arose out of the action No. 698, and was an opposition *à fin de distraire*, lodged by the predecessor in office of the Attorney-General against an execution under a writ of *fieri facias de bonis et de terris*, issued at the suit of the Appellants, to recover their costs in the action No. 618. The appeal of the Attorney-General from the judgment of the Superior Court in this action was distinguished as No. 141.

Appeal No. 18 was an appeal by the Respondent company against the judgment of the Superior Court in favour of the Appellants in action No. 698.

The company was originally incorporated as a Provincial Railway Company by the 82 Vict. c. 55, of the Quebec Legislature, under the name of "La Compagnie du Chemin à Lisses de Colonisation du Nord de Montreal;" and afterwards, by virtue of the provisions of an Act, 86 Vict. c. 82, of the Parliament of the Dominion of Canada, became a federal company authorized to construct a railway uniting two Provinces and passing from the Province of Quebec into the Province of Ontario. By virtue of the provisions of the 88 Vict. c. 68, the name of the company was changed to its present name, "La Compagnie du Chemin de Fer de Montreal, Ottawa et Occidental."

The company, being unable to complete its authorized works, executed a deed, dated the 16th of November, 1875,

which was afterwards ratified by an Act of the Quebec Legislature, 39 Vict. c. 2, s. 8, assented to the 24th of December, 1875, whereby, after it had been declared that the company was unable duly to execute the said works, the said works were abandoned by the company, and the company, for the considerations therein mentioned, duly conveyed all its rights in the works theretofore executed and in the lands acquired or in course of acquisition for the said railroad to the Quebec Government.

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The Quebec Government then took upon itself the construction of a line of railway (authorized by the Act 39 Vict. c. 2, of the Quebec Legislature), part of which traverses the tract of country in which the Company had an exclusive interest, and for the construction of which last-mentioned line of railway the incomplete works of the company were used. This last-mentioned line of railway is the present Quebec, Montreal, Ottawa and Occidental Railway, which, at the time of the passing of the last-mentioned Act, did not extend beyond the limits of the Province of Quebec.

[Proceedings were commenced by the company for the expropriation of certain lands, and arbitrators were appointed, who thereafter made their award, which, by action No. 698, the company sought to have annulled.]

The Superior Court of Montreal (Johnson, J.) dismissed the action with costs [but this judgment was on the 14th of December, 1878, reversed by the Court of Queen's Bench]. . . . .

On the 22nd May, 1877, the Appellants caused to be issued a writ of *feri facias de bonis et de terris*, commanding the Sheriff of Montreal to levy upon the goods and chattels and lands and tenements of the company the sum of \$591.50, the amount of the costs awarded to the Appellants in suit No. 698. The Sheriff returned that he



**BOURGOIN** had been unable to find any goods and chattels belonging to the company, but had seized certain immoveables, a schedule of which was annexed, and that an opposition *à fin de distraire* on the part of the Attorney-General had

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been lodged in his hands, by reason whereof he was unable to proceed to a sale of the immoveables under the writ. A small part of the immoveables consisted of certain lands which previously to the transfer formed part of the undertaking of the company. The remainder of the immoveables consisted of lands, rolling stock, and railway plant purchased by the Quebec Government subsequent to the transfer.

In that opposition, the Attorney-General claimed the whole of the property seized as the property of the Queen for the use of the Province of Quebec; and further alleged that, inasmuch as the appeal against the judgment in No. 698 was still pending, the proceedings in execution of that judgment were thereby suspended. The Appellants pleaded a dilatory exception, and also to the merits :—

That the Act 39 Vict. c. 2, under which the opposing party made title, and all agreements therein referred to, could not confer on the Province of Quebec any title to the goods seized in this cause, because, by the 36 Vict. c. 82 (Canada), the railway had been declared a work for the general advantage of Canada, and was held incorporated under the Canada Railway Act, 1868, and no part of the Quebec Railway Act, 1869, applied thereto; that afterwards, by 38 Vict. c. 68 (Canada), its name was changed to that under which it now sued; that thus constituted, it could not enter into any of the agreements mentioned in the 39 Vict. c. 2 (Quebec), without being authorized or ratified by the Parliament of Canada, which had never been done, so that they remained without any legal effect whatever.

They further pleaded that the Attorney-General as such had no powers except those conferred by the Legislature, and that there was no legislation justifying his opposition.

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The opposing party joined issue on these pleas.

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Both the Superior Court and the Court of Queen's Bench allowed the opposition, and declared the lands seized to be the property of the Queen for the Province of Quebec, and the seizure illegal and invalid.

[The argument and judgment as to the validity of the award (pp. 388-396) are omitted.]

Mr. Doutre, Q.C. (of the Canadian Bar), and Mr. Fullarton, for the Appellants.

Mr. Jeune (Mr. Benjamin, Q.C., with him), for the Respondents.

Reference was made to *Yeo v. Tatem* (1); *Gardner v. London, Chatham, and Dover Railway* (2); *Richmond Water-works v. Vestry of Richmond* (3); *Great Western Railway Company v. The Birmingham and Oxford Junction Railway* (4).

On the 26th day of February, the following judgment of their Lordships was delivered by

SIR JAMES W. COLVILLE:—

The judgment of their Lordships, which was delivered on the 14th instant, and ruled that the award of the 28th of July, 1876, was bad on the face of it, disposed, except as to costs, of the appeals numbered 13 and 144 respectively, and of all the questions on this record between the Appellants and the Respondent company.

It seemed, moreover, to leave to the Appellants no substantial interest, other than costs, in the rest of the liti-

(1) L. R. 3 P. C. 696. (2) L. R. 2 Ch. 201. (3) 3 Ch. D. 82. (4) 2 Phill. 597.

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gation. Their counsel, however, expressed a desire to argue the remaining appeals (Nos. 117 and 141), and satisfied their Lordships that they were entitled to do so. Those appeals have accordingly been heard, and their Lordships have now to give judgment upon them. In order to see clearly what are the questions raised by them, it is necessary to refer shortly to some of the proceedings in the two actions numbered respectively in the Superior Court 693 and 1,213.

In the latter of these, which was brought by the Appellants against the company in December, 1874, in order to recover the amount due on the award, the Respondent, the Attorney-General, intervened in the month of February, 1878. The cause was heard on the 18th of April, 1878, by Mr. Justice Mackay in the Superior Court against both the company, the defendants, and the Attorney-General as intervenor, and the judgment of that Court dismissed the intervention, and condemned the company to pay to the Appellants the amount due on the award. From this judgment the company and the Attorney-General appealed separately. The Court of Queen's Bench reversed the judgment of the Superior Court against the company, and the appeal of the Appellants against so much of their judgment (No. 144) has already been disposed of. The appeal of the Attorney-General was also allowed, and the judgment of the Superior Court reversed as against him, but on the ground that the intervention, though legally competent, was unnecessary, without costs. Hence the appeal No. 117.

Again, the Superior Court, by its judgment in suit No. 693, wherein the company sued to set aside the award, dismissed that suit with costs. The company appealed against that judgment, and has succeeded both in the Court of Queen's Bench and here in getting it reversed. The date, however, of the judgment of the

Superior Court was the 30th of April, 1877; the appeal against it was not lodged until the 5th of October following, and intermediately, i.e., on the 22nd of May in that year, the Appellants issued a writ of execution for their costs, under which the sheriff seized certain lands, rolling stock, and other property as belonging to the company. On the 17th of January, 1878, the Attorney-General filed an *opposition à fin de distraire*, by which he claimed the whole of the property seized as the property of the Queen for the use of the Province of Quebec. The Appellants filed their contestation, and on the 31st of May, 1878, Mr. Justice Johnson pronounced the judgment of the Superior Court, which upheld the opposition; declared that all the lands seized were the property of Her Majesty for the use of the Province of Quebec; that accordingly the seizure of the lands, immoveables, and accessories in question was null, void, and illegal, and granted *main levée* thereof to the opposant, with costs against the contestants, the present Appellants. That judgment was, on appeal, confirmed by the Court of Queen's Bench, and hence the appeal No. 141.

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The determination of both these appeals mainly depends on the effect to be given to the transaction between the company and the Government of Quebec which is embodied in the Notarial Act or Deed of the 16th of November, 1875, and in Act 39 Vict. c. 2, of the Legislature of Quebec. The parties to the Deed are stated to be Her Majesty the Queen, represented by the Secretary of the Province of Quebec, "acting as well for and on behalf of Her Majesty as for and on behalf of the Province of Quebec, party hereto of the first part, hereinafter called 'the Government,' and the Montreal, Ottawa, and Western Railway Company, described as a body politic and corporate, duly incorporated by statutes of the Province of Quebec and of the Dominion of

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Canada, &c., party hereto of the second part, herein-  
after called 'the Company.'” The Deed, after reciting  
the nature of the enterprise and the commencement of  
the work, and that the company was then unable to pro-  
ceed further with the construction of the railway by rea-  
son of certain bonds not being negotiated; and that the  
Government was willing to assume and complete the  
construction of the said railway upon such terms and  
conditions, and in such manner and within such time as  
the Government might deem expedient, and for that pur-  
pose to acquire from the said company all its rights and  
assets, and to take upon itself the legitimate liabilities of  
the company, and to repay the disbursements of the  
company in manner and form and to the extent therein-  
after described; and that in consideration thereof the  
company had agreed to transfer and convey such rights  
and assets to the Government also upon the conditions  
thereinafter expressed—proceeds to state, in different  
clauses, the covenants and agreements into which the  
parties had entered before the notary. The material  
clauses are the 1st, 2nd, 4th, 7th, 8th, and 9th.

By the 1st, the company granted, sold, and conveyed  
to the Government all its right, title, and interest in the  
uncompleted railway, with all lands acquired or bonded  
for right of way, stations, and other purposes, all bridges,  
piers, abutments, forms, and other things expressly men-  
tioned, stating their intention to be, “to divest the com-  
pany of all the property of the said corporation, and of  
all and every part and parcel of the said incomplete  
railway, and of everything appertaining thereto or neces-  
sary or useful or acquired for the construction thereof,  
“now in the possession of the company, or to which it  
is entitled as fully and completely to all intents and  
purposes as the same are now held by the company, and  
to vest the same in the Government.”

By the 2nd, the company transferred to the Government all its right, title, and interest in and to the balance of the subscription of stock in the said company by the corporation of the city of Montreal, and the several subscriptions of stock in the said company of various other corporations, together with all the rights, claims, and demands of the said company upon the said city of Montreal for the said balance of subscriptions, and upon the said other corporations for their said subscriptions of stock and bonus.

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By the 4th, the Government, in consideration of the above sales and transfers, agreed to pay to certain trustees, for the company, upon the confirmation of the Deed, the sum of \$57,149.95 currency, being the amount of the then paid-up capital of the company; and also to pay immediately all such disbursements and liabilities as had been adjusted between the Government and the company; and it was further agreed that if any further legitimate liabilities should be established to the satisfaction of the Government to be justly and legally due by the company, the same should also be assumed and paid by the Government.

By the 7th, it was provided that, until it should please the Government to receive possession of the property and premises thereby transferred, the company should hold and administer the same for and on behalf of the Government, and in such manner as should be directed by it, and should in all respects carry out the instructions of the Government in respect of the said railway, and in respect of every matter and thing connected therewith, until the transfer and delivery thereof to the Government and its complete assumption and possession thereof had been perfected; and that so soon as such transfer and delivery should have been so perfected the company should dissolve itself, and should cease to act

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in any way, the Government thereupon indicating some person to accept transfers of the shares of the company held by the individual shareholders therein.

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By the 8th, the company undertook to assist the Government, in any manner that might be required, in procuring the passage of any Act by the Dominion or the Provincial Parliament that the Government might deem expedient to have passed in the interest of the enterprise, and to furnish aid and assistance in other matters.

And, by the 9th, it was provided that the Deed should have no force or effect after the termination of the next Session of the Legislature of the Province of Quebec, unless confirmed by the said Legislature at the next Session thereof, nor until such confirmation; but that it should be submitted for such confirmation to the next Session of the said Legislature, and, immediately upon such confirmation, should have full force and effect according to its terms.

The confirmation required by this last clause of the Deed was given by the Act 39 Vict. c. 2, which was passed by the Legislature of Quebec on the 24th of December, 1875. That Statute not only, by its 8th section, confirmed in the fullest manner the transfer and assignment of the 2nd of November, 1875; it did a great deal more, it combined the enterprise of the Montreal, Ottawa, and Western Railway Company with that of another company called the North Shore Railway Company, which had made a similar transfer in favour of the Government of Quebec; it gave to the railway to be completed the new name of "The Quebec, Montreal, Ottawa and Occidental Railway;" it declared that railway to be a public work belonging to the Province of Quebec, held to and for the public uses of the Province, and provided for the mode of its construction; it vested the construction and management of that railway in certain

Commissioners, with ample and defined powers; by section 11 it made the provisions of the Quebec Railway Act, 1869, so far as they were applicable to the undertaking and not inconsistent with the provisions of that Act, applicable to the said railway, and empowered the Commissioners, in cases where proceedings had been commenced by the Montreal, Ottawa, and Western Railway for the expropriation and acquisition of lands for the purposes of that railway, and had not been completed, to continue such proceedings under the provisions of the Quebec Railway Act, but with the consent of the proprietor of such lands, or to discontinue such proceedings, and commence proceedings *de novo* under the said Quebec Railway Act; and by section 24 it reunited lands which had been granted to the Montreal, Ottawa, and Western Railway Company, to the public lands of the Province. Sections 43, 44, 45, and 46 have even a more direct bearing upon the questions raised by the two appeals now under consideration. Section 43, in order "to avoid all doubts," enacts that the Quebec, Montreal, and Occidental Railway is thereby invested with all the rights, powers, immunities, franchises, privileges, or assets granted by the Legislature of the Province of Quebec to the Northern Colonization Railway Company, and, so far as that Legislature could do, with all the rights, powers, immunities, franchises, privileges, and assets granted by the Parliament of the Dominion of Canada to the Montreal, Ottawa, and Western Railway Company. Section 44 takes away the power of the last-mentioned company to appoint Directors, and abolishes the Directorate contemplated by the former Statutes. Section 45 transfers to the Commissioners the rights of the individual shareholders in the Montreal, Ottawa, and Western Railway Company, providing that their paid-up stock shall be refunded to them; and section 46 au-

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thorizes the Commissioners, with the consent of the Lieutenant-Governor in Council, to apply to the Parliament of Canada for any legislation which may be deemed necessary for the purposes of the Act.

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The combined effect, therefore, of the Deed and of this Statute, if the transaction was valid, was to transfer a federal railway, with all its appurtenances, and all the property, liabilities, rights, and powers of the existing company, to the Quebec Government, and, through it, to a company with a new title and a different organization ; to dissolve the old federal company, and to substitute for it one which was to be governed by, and subject to, Provincial legislation.

It is contended on the part of the Appellants that this transaction was invalid, and altogether inoperative to affect the obligations of the company. They insist that, by the general law, and by reason of the special legislation which governed it, the company was incompetent thus to dissolve itself, to abandon its undertaking, and to transfer that, and its own property, liabilities, powers, and rights to another body, without the sanction of an Act of a competent Legislature ; and, further, that the Legislature of Quebec was incompetent to give such sanction. This contention appears to their Lordships to be well founded.

That such a transfer, except under the authority of an Act of Parliament, would in this country be held to be *ultra vires* of a railway company, appears from the judgment of Lord Cairns in *Gardner v. London, Chatham, and Dover Railway Company* (1). That it is equally repugnant to the law of the Province of Quebec, so far as that is to be gathered from the Civil Code, is shewn by the 369th Article of that Code. But the strongest ground in favour of the Appel-

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(1) L. R. 2 Ch. 201, 212.

lants' contention is to be found in the special legislation touching this railway company. The history of the company and of its conversion from a provincial into a federal railway company has been stated in the judgment already delivered. By section 1 of the Canadian Statute, 86 Vict. c. 82, which effected that conversion, the railway was declared to be a work for the general advantage of Canada. By the 5th section of the same Statute it was enacted that the continuations of the line thereby authorized should be deemed to be railways or a railway to be constructed under the authority of a special Act passed by the Parliament of Canada, and that the company should be deemed to be a company incorporated for the construction and working of such railways and railway, according to the true intent and meaning of the Railway Act, 1868 (the Dominion Statute). By the 6th section, parts 1 and 2 of the Railway Act, 1868 (which comprise all the general and material provisions of that Statute), were made applicable to the whole line of the railway, whether within or beyond the enterprise originally contemplated; and it was enacted that no part of the Quebec Railway Act, 1869, should apply to the said railway, or any part thereof, or to the said company. And by the 7th section it was provided that the two Acts of the Quebec Legislature (82 Vict. c. 35, and 34 Vict. c. 28), by which the company had been incorporated, and previously governed, should be read and construed and have effect as if the changes of expression therein mentioned (the effect of which would be to make them speak as Acts of the Canadian Parliament) had been made in them; that so read and construed and taking effect, they should be deemed to be special Acts according to the true intent and meaning of the Railway Act, 1868, and that no part of the Quebec Railway Act, 1869, should be incorporated with the said

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special Acts, or either of them, or form part thereof, or be construed therewith as forming one Act.

These provisions, taken in connection with, and read by the light of those of the Imperial Statute, the B. N. A. Act, 1867, which are contained in section 91, and sub-section 10c of section 92, establish, to their Lordships' satisfaction, that the transaction between the company and the Government of Quebec could not be validated to all intents and purposes by an Act of the Provincial Legislature, but that an Act of the Parliament of Canada was essential in order to give it full force and effect. This proposition was, finally, hardly disputed by the learned Counsel for the Respondent, but they relied upon the 8th clause of the Deed, and the 46th section of the Quebec Act, as shewing that recourse to the Parliament of Canada for its sanction was within the contemplation of the parties, and contended that, before that sanction was obtained, the transaction was valid for some purposes, and gave certain inchoate rights which were capable of being asserted. In support of their argument they cited *The Great Western Railway Company v. The Birmingham and Oxford Junction Railway* (1), and what was said by Lord Cottenham in that case. It is to be observed, however, that Lord Cottenham, when ruling that the contract, which could not be fully carried out without Parliamentary sanction, was not, in the absence of such sanction, to be treated as a nullity, and that some of its provisions might nevertheless be binding, was dealing with the rights of the parties to the contract *inter se*. Here the public, and the creditors of the company, in which category the Appellants fell, since the questions raised by these two appeals must be considered as if the award were valid, were no parties to the transaction, and could not be affected by it until it was fully validated by an Act of the

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(1) 2 Phill. 597.

Parliament of Canada, to obtain which no attempt seems ever to have been made. In their Lordships' opinion, therefore, the transaction, considered as a whole, was of no force or validity as against the rights of the Appellants when the decisions of the Canadian Courts upon the intervention and the opposition were passed.

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This being their Lordships' conclusion, they proceed to consider how it affects the two appeals, and first that which relates to the Attorney-General's intervention. Now, if it be admitted, for the sake of argument, though their Lordships must not be taken to affirm the proposition, that the Attorney-General had such an inchoate right under the transaction as would have justified his intervention had there been reason to suppose that the expiring company would fail to make a substantial defence to the action No. 1,213, it is to be observed that that was not the actual state of things. The action itself was not commenced until December, 1876, and the defences of the company were filed on the 30th of that month. The transaction between the company and the Quebec Government was completed, so far as it was ever completed, in December, 1875. It is, therefore, obvious that, in the first instance, the Quebec Government intended to defend the action, in the name of the company, under the provisions of the 7th clause of the Deed. All objections which the company could take to the award, and in particular the one which has proved fatal to it, were taken in their defences. The intervention of the Attorney-General was not until 1878, and the reasons filed by him on the 17th of September in that year are sufficient to shew that the object of the intervention was to raise objections to the validity of the award, founded upon the attempted transfer of 1875, which could not have been taken in the name of the company. Those reasons, the contestation of them, and the other plead-

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ings shew that the new issues raised between the parties were the validity of the transfers as against the Appellants, the right of the Commissioners under the Quebec Act to continue or discontinue the proceedings in the expropriation, the abandonment of the railway, and its transformation into a new railway, to be constructed under different conditions. This intervention was only necessary for the trial of these fresh and additional issues; and was, as the Court of Queen's Bench itself has found, wholly unnecessary for the trial of the original issues. Upon the trial of the action in the Superior Court, Mr. Justice Mackay expressly found "que les faits allégués dans la dite intervention, savoir le transport des droits et actions de la dite défenderesse au Gouvernement de la dite Province de Québec, n'a pas été prouvé avoir lieu légalement," a finding in accordance with the conclusion to which their Lordships have come touching the transaction of 1875, and one which would justify the dismissal of the intervention, even if the learned Judge had taken a view different from that which he did take of the validity of the award. The Attorney-General has failed to shew any grounds for inflicting upon the Appellants the costs of unnecessary and expensive proceedings. In these circumstances, their Lordships are of opinion that the Court of Queen's Bench ought to have dismissed the appeal of the Attorney-General, and to have affirmed the judgment of the Superior Court, in so far as it related to the intervention, with costs.

Their Lordships have now to consider Appeal No. 144, which arises out of the "*opposition à fin de distraire*." That opposition to the execution could not succeed as to such of the lands seized as had belonged to the company, unless it were established that the property in those lands had been changed by the attempted transfer of 1875. Their

Lordships are of opinion that there was no such change of property. The transaction, viewed as a whole, and as one single contract, could not, for the reasons above stated, operate as a valid transfer of the lands of the company to the Government of Quebec. Their Lordships feel bound to dissent from two propositions, on one of which the judgment of Mr. Justice Johnson, and on the other of which the judgment of Chief Justice Dorion, in part proceeds. Mr. Justice Johnson ruled that the contestants ought, if they questioned the validity of the transaction of 1875, to have concluded that it should be set aside or declared null, and that, by reason of their failure to do so, they must be taken to be bound by it. Chief Justice Dorion expressed an opinion that it was only at the instance of the Government of Canada (the Dominion), or of an individual who could shew that he had a special interest distinct from that of the public, that the transfer could be set aside. These reasons are somewhat contradictory, and their Lordships cannot think that either affords a good ground for the judgment impeached. If the transaction, not having the sanction of the Parliament of Canada, were *ultra vires* of the company and the Government and Legislature of Quebec, it was of no legal force or validity against the Appellants, and might be so treated by them whether it were formally set aside or not. The other ground on which the judgment proceeds, and which has been chiefly insisted upon here, is more plausible. It is that the company had power, under the second sub-section of the 7th section of the Railway Act, 1868, to "alienate, sell, and dispose of its lands;" that the transaction of 1875, even if invalid as a whole, is severable, and that the company must be taken to have sold by it their land to the Government of Quebec in the exercise of that power. Their Lordships cannot accede to this argument. It appears to them that

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BOURGOIN the contract is not severable in the manner suggested.  
 LA COMPAGNIE It is a contract whereby, for the same consideration,  
 DU CHEMIN DE everything which it purported to pass was intended to  
 FER DE MONT- pass. Suppose what was suggested by Chief Justice  
 REAL, OTTAWA Dorion were really to happen, that the Dominion Gov-  
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government were to take steps to set aside the transaction, could the Government of Quebec be heard to say, "True, the transaction will not stand as a transfer of the railway, or of the rights, powers, liabilities, and duties of the company, but it may enure as a sale of the lands acquired in order to the construction of the railway, or part of them, in the exercise of the power in question." Would not the answer be, "There is no trace of such a contract, or of an intention to make it?"

By the evidence taken on this proceeding, it appeared that a considerable part of the lands, rolling stock, and other property seized, had never belonged to the company, but had been purchased by the Commissioners since 1875.

In respect of that property, the Attorney-General was entitled to succeed in his opposition. He should, however, have been held to have failed as to the lands, etc., which had belonged to the company. And in their Lordships' opinion, the proper order to be made was one which would have upheld the seizure as to this latter part of the property in question, whilst it granted *main levée* as to the rest, leaving each party to pay their own costs. Since the execution must now altogether fail by reason of the award having been set aside, it will not be necessary to draw up a formal order to the above effect.

The order which their Lordships will humbly recommend Her Majesty to make on the four consolidated appeals will be to the following effect, viz., to dismiss the appeals numbered respectively 13 and 144, and to allow those numbered respectively 117 and 141; to

affirm the judgment of the Court of Queen's Bench in the suit No. 698, wherein the company was plaintiff, and the Appellants and others were defendants; to reverse so much of the judgment of the Court of Queen's Bench in the action 1,218, wherein the Appellants were plaintiffs, and the company, were defendants, and the Attorney-General intervenor, as relates to the intervention of the Attorney-General, and in lieu thereof to affirm so much of the judgment of the Superior Court in the same suit as relates to such intervention, with the costs of the appeal to the Queen's Bench; but to affirm in all other respects the last-mentioned judgment of the Court of Queen's Bench; to reverse the judgment of the Court of Queen's Bench in the matter of the opposition "*à fin de distraire*," and to declare that in lieu thereof, an order should have been made reversing the judgment of the Superior Court in such matter, and declaring that the opposition should have been allowed as to so much only of the property seized as had been purchased by the Commissioners since 1875, and disallowed as to the rest, and that each party should bear their own costs in both Courts, but that by reason of the failure of the execution in consequence of the setting aside of the award, it had become unnecessary to draw up any such order.

Their Lordships are of opinion that, under the circumstances, no order should be made as to the costs of these consolidated appeals.

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## [PRIVY COUNCIL.]

J. C.\*

1880

Feb. 24, 25;  
April 15.CHARLES CUSHING.....*Claimant,*

AND

LOUIS DUPUY.....*Contestant.**On appeal from the Court of Queen's Bench for Quebec, Canada.**[Reported 5 App. Cas. 409.]**Prerogative of the Crown to admit Appeals—Powers of Dominion and Provincial Legislatures—B. N. A. Act, 1867, ss. 91, 92—Canadian Act, 40 Vict. c. 41, s. 28—"Final."*

The B. N. A. Act, 1867, s. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, conferred on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as these might be affected by a general law relating to those subjects; consequently the Dominion enactment, 40 Vict. c. 41, s. 28, providing that the judgment of the Court of Appeal in matters of insolvency should be final, i.e., not subject to the appeal as of right to Her Majesty in Council, allowed by the Lower Canada Civil Procedure Code, Art. 1178, is within the competence of the Dominion Parliament, and does not infringe the exclusive powers given to the Provincial Legislatures by sec. 92 of the Imperial Statute; nor does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code.

The section, according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and, *quære*, what powers may be possessed by the Parliament of Canada so to do.

*Cuvillier v. Aylwin* (1) reviewed.

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\* Present:—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

(1) 2 Knapp, P. C. 72.

Appeal from a judgment of the Court of Queen's Bench [of the Province of Quebec] (March 22, 1878), whereby a judgment of the Superior Court (Oct. 5, 1877) was reversed.

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STATEMENT.

[The question raised in the case was as to the Appellant's right to certain property belonging to an insolvent estate, and which the Appellant claimed from the assignee (the Respondent).

The judgment of the Court of Queen's Bench dismissed the Appellant's petition with costs, on grounds which it is not necessary to set out.]

Thereupon the Appellant moved for leave to appeal to Her Majesty in her Privy Council, and it was ordered that a rule *nisi* be issued for that purpose. The rule was argued, and, on the 22nd of June, 1878, was unanimously discharged by the Court, consisting of the same judges as had heard the appeal, on the ground that by law judgments rendered on appeals to the Court of Queen's Bench in matters of insolvency are final, and that from such judgments no appeal lies to Her Majesty in Her Privy Council.

On the 27th of November, 1878, by an order of Her Majesty in Council, the Appellant was allowed to enter and prosecute his appeal, without prejudice to the question of Her Majesty's jurisdiction to admit appeals in cases of insolvency from the Court of Queen's Bench.

Mr. Kenelm Digby, for the Respondent, as a preliminary objection to the appeal, contended that the jurisdiction of Her Majesty to entertain it had been taken away by Canadian Statute 40 Vict. c. 41, s. 28, which amended the Insolvent Act of 1875 (38 Vict. c. 16, s. 128), by adding thereto the words, "the judgment of the Court to which under this section the appeal can be made shall be final." Such provision was within the

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competence of the Dominion Parliament, by virtue of its general legislative authority, and of the special powers relating to bankruptcy and insolvency conferred by B. N. A. Act, 1867, s. 91. "Final" may mean—1st, final in the Colony, *i. e.*, prohibiting an appeal to the Supreme Court; or 2nd, that the prerogative of the Crown to grant an appeal is taken away; or 3rd, that the appeal as of right to the Crown is taken away. It was intended to render the judgment referred to final as far as the Legislature could make it final; and therefore the question resolves itself into one of the extent of the legislative authority, whether it could and had taken away the royal prerogative. The authorities cited were, *Cuvillier v. Aylwin* (1); *Modee Kaikhooscrow Hormusjee v. Cooverbhaee* (2); *In re Louis Marois* (3); *Queen v. Eduljee Byramjee* (4); *Queen v. Stephenson* (5); *Théberge v. Landry* (6); *Johnston v. Minister of St. Andrew's* (7). Assuming that Her Majesty's jurisdiction is not taken away, no case has been made out for granting special leave. (Sir Montague E. Smith—But leave has been granted, and the case is here, and, unless the jurisdiction has been taken away, had better proceed.)

Mr. Davidson (of the Canadian Bar), for the Appellant, contended that the appeal lay as of right to the Crown under Art. 1178. Such appeal cannot be taken away by a Dominion enactment; if it could be interfered with at all by Canadian authority, it must be by the Provincial Legislature, which had the exclusive right of dealing with this matter, being one of civil procedure: *See B. N. A. Act, 1867, sec. 91, sub-sec. 27, and sec. 101.* Reference was made to *Meer Reasat Hossein v. Hadjee*

(1) 2 Knapp, P.C. 72.

(2) 5 Moore, Ind. Ap. Ca. 448, 454, 455.

(3) 15 Moore, P.C. 189.

(4) 5 Moore, P.C., 276.

(5) 5 Moore, P.C., 296.

(6) 2 App. Cas. 102.

(7) 3 App. Cas. 159.

Abdoolah (1). The word "final," in sec. 28 of the Dominion Act (40 Vict. c. 41), does not necessarily mean more than that the judgment was final as regards the Canadian Courts. The power of appeal to the Privy Council is not expressly taken away; while as regards the prerogative of the Crown to grant the special leave which has already been accorded, the section does not purport to interfere therewith. It would require express and precise words to cut down the prerogative, even if the Parliament of Canada had power so to do.

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Mr. Digby replied.

[The argument and judgment upon the merits are omitted, not being material to the question on the B. N. A. Act.]

The judgment of their Lordships was delivered by  
SIR MONTAGUE E. SMITH:—

This appeal is from a judgment of the Court of Queen's Bench of the Province of Quebec, reversing the judgment of a judge of the Superior Court, which had been given in the Appellant's favour, in certain proceedings in insolvency instituted under an Act of Parliament of the Dominion of Canada, intituled "An Act respecting Insolvency" (38 Vict. c. 16).

These proceedings were commenced by a petition of Mr. Cushing, the Appellant, to the Superior Court, praying that Mr. Dupuy, the official assignee of the estate of the insolvent firm of McLeod, McNaughton & Léveillé, might be ordered to deliver up certain property seized by him, as such assignee, under a writ of attachment, on the ground that it had been sold to the petitioner by the insolvents before their insolvency.

An application to the Court of Queen's Bench for leave to appeal to Her Majesty in Council was refused,

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on the ground that, under the Insolvency Act, its judgment was final. The Appellant then presented a petition to Her Majesty for special leave to appeal, which Her Majesty was advised by their Lordships to grant, reserving to the Respondent power to raise at the hearing the question of Her jurisdiction to entertain the appeal.

That question, which has been fully argued at the Bar, raises two points: first, whether the Court of Queen's Bench was right in holding that the appeal to Her Majesty in Council, given *de jure* by Art. 1178 of the Code of Civil Procedure, from final judgments rendered on appeal by that Court, is taken away by the Insolvency Act; and, secondly, if that be so, whether the power of the Crown, by virtue of its prerogative, to admit the appeal is affected by that Act.

The 128th section of the Insolvency Act enacts as follows:—

“In the Province of Quebec all decisions by a Judge in Chambers in matters of insolvency shall be considered as judgments of the Superior Court; and any final order or judgment rendered by such Judge or Court may be inscribed for revision, or may be appealed from by the parties aggrieved, in the same cases and in the same manner as they might inscribe for revision or appeal from a final judgment of the Superior Court in ordinary cases under the laws in force when such decision shall be rendered.”

By the 28th section of a subsequent Act of the Parliament of Canada, 40 Vict. c. 41, it is enacted that the 128th section of the former Act shall be amended by adding thereto the following words:—

“The judgment of the Court to which, under this section, the appeal can be made shall be final.”

This Court, in the Province of Quebec, is the Court of Queen's Bench.

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The whole question turns on these added words, and, in considering their effect on the right of appeal to the Crown given *de jure* by the Code, two things are to be regarded: (1) the power of the Dominion Parliament to abrogate this right; and (2), if it had the power, whether it intended to exercise it.

The first of these questions depends upon the construction of the B. N. A. Act, 1867, which confers and distributes legislative powers. By section 91 of that Act, exclusive legislative authority in certain matters is conferred upon the Parliament of Canada; and by section 92, exclusive authority in certain others upon the Provincial Legislatures.

Section 91 is as follows:—

“It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and, for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

“21. Bankruptcy and Insolvency.”

Section 92 enacts—

“In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say—

“13. Property and civil rights.

“14. The administration of justice in the Province,

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including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts."

It was contended for the Appellant that the provisions of the Insolvency Act interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislature of the Province.

The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them. Their Lordships therefore think that the Parliament of Canada would not infringe the exclusive powers given to the Provincial Legislatures, by enacting that the judgment of the Court of Queen's Bench in matters of insolvency should be final, and not subject to the appeal as of right to Her Majesty in Council allowed by Art. 1178 of the Code

of Civil Procedure. Nor, in their Lordship's opinion, would such an enactment infringe the Queen's prerogative, since it only provides that the appeal to Her Majesty given by the Code framed under the authority of the Provincial Legislature, as part of the civil procedure of the Province, shall not be applicable to judgments in the new proceedings in insolvency which the Dominion Act creates. Such a provision in no way trenches on the Royal prerogative. Then it was contended that if the Parliament of Canada had the power, it did not intend to abolish the right of appeal to the Crown. It was said that the word "final" would be satisfied by holding that it prohibited an appeal to the Supreme Court of Canada, established by the Dominion Act of the 38th Vict. c. 11. Their Lordships think the effect of the word cannot be so confined. It is not reasonable to suppose that the Parliament of Canada intended to prohibit an appeal to the Supreme Court of Appeal recently established by its own legislation, and to allow the right of immediate appeal from the Court of Queen's Bench to the Queen to remain. Besides, the word "final" has been before used in Colonial legislation as an apt word to exclude in certain cases appeals as of right to Her Majesty. (*See the Lower Canada Statute, 34 Geo. III. c. 30.*) Such an effect may, no doubt, be excluded by the context, but there is none in the enactment in question to limit the meaning of the word. For these reasons their Lordships think that the judges below were right in holding that they had no power to grant leave to appeal.

The question of the power of the Queen to admit the appeal, as an act of grace, gives rise to different considerations. It is, in their Lordships' view, unnecessary to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative,

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since the 28th section of the Insolvency Act does not profess to touch it, and they think, upon the general principle that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment. In consequence, however, of the decision in *Cuvillier v. Aylwin* (1), which has been relied on as an authority opposed to this view, it becomes necessary to review that case in connection with the subsequent decisions on the subject.

The question in *Cuvillier v. Aylwin* arose upon the Lower Canada Colonial Act, 34 Geo. III. c. 6, which enacted that the judgment of the Court of Appeal should be final in all cases under the value of £500, and an application for special leave to appeal in a case under that value was refused by a Committee of the Privy Council. The remarks attributed to the Master of the Rolls, in his judgment rejecting the petition, are directed to one aspect only of the question, viz., the power of the Crown with the other branches of the Legislature to deprive the subject of one of his rights. No allusion was made to the principle that express words are necessary to take away the prerogative rights of the Crown, nor to the provision contained in the statute itself, that nothing therein contained should derogate from any right or prerogative of the Crown. This case, moreover, if not expressly overruled, has not been followed, and later decisions are opposed to it.

*In re Louis Marois* (2), upon an application for leave to appeal from a judgment of the Court of Queen's Bench for Lower Canada, Lord Chelmsford, in giving the judgment of this Committee, after stating that in *Cuvillier v. Aylwin* the very point was decided against the petitioner, said :—

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(1) 2 Knapp's, P.C. 72.      (2) 15 Moore, P.C. 189.

"If the question is to be concluded by that decision, this petition must be at once dismissed, but upon turning to the report of the case, their Lordships are not satisfied that the subject received that full and deliberate consideration which the great importance of it demands. The report of the judgment of the Master of the Rolls is contained in a few lines; and he does not appear to have directly adverted to the effect of the proviso contained in the 48rd section of the Act on the prerogative of the Crown."

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Leave to appeal was granted in that case, subject to the risk of a petition being presented to dismiss the appeal as incompetent. Although their Lordships, in granting this leave, said that they desired to intimate no opinion whether the decision in *Cuvillier v. Aylwin* could be sustained or not, it is obvious that, at the least, they regarded it as being open to review.

In *Johnston v. The Minister and Trustees of St. Andrew's Church* (1), upon an application for special leave to appeal against a judgment of the Supreme Court of Canada, the effect of the 47th section of the Act establishing that Court, which enacted that its judgments should be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative, came in question, and the Lord Chancellor, in giving the judgment of this Committee, said:—

"Their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section."

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Although leave to appeal was in this instance refused, on the ground that the case was not a proper one for the exercise of the prerogative, the opinion cited above is virtually opposed to the decision in *Cuvillier v. Aylwin*, where, it is to be remembered, the Act in question likewise contained a saving of the prerogative of the Crown.

Another case lately before this Committee requires consideration—*Théberge* and another *v. Landry* (2). It was an application for special leave to appeal against a judgment of the Superior Court of Quebec upon an election petition, by which the applicant had been unseated for corrupt practices. By the Quebec Controverted Elections Act, 1875, the decision of controverted elections, which formerly belonged to the Legislative Assembly itself, was conferred upon the Superior Court, and by section 90 of the Act it was enacted that the judgment of that Court sitting in review should not be susceptible of appeal. It was held by this Committee that there was no prerogative right in the Crown to review the judgment of the Superior Court upon an election petition, and the application was refused. This decision turned on the peculiar nature of the jurisdiction delegated to the Superior Court, and not merely on the prohibitory words of the statute. It was distinctly and carefully rested on the ground of the peculiarity of the subject-matter, which concerned not mere ordinary civil rights, but rights and privileges always regarded as pertaining to the Legislative Assembly, in complete independence of the Crown, so far as they properly existed; and consequently it was held that, in transferring the decision of these rights from the Assembly to the Superior Court, it could not have been intended that the determi-

nation in the last resort should belong to the Queen in Council. But, whilst coming to this decision, the Lord Chancellor, in giving the judgment of the Committee, affirmed the general principle as to the prerogative of the Crown :—

“ Their Lordships wish to state distinctly that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away, except by express words ; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shewn to take away that prerogative.”

It was not suggested that an appeal would not have lain to the Queen in Council under the Insolvency Act of 1875 ; and it was not until two years afterwards that the Amending Act of 1877, which is said to have taken it away, was passed.

The learned counsel for the Appellant drew attention to the Act of the Parliament of Canada, 31 Vict. c. 1, which enacts rules of interpretation to be applied to all future legislation, when not inconsistent with the intent of the Act or the context.

Sub-section 33 of section 7 of that Act is as follows :—

“ No provision or enactment in any Act shall affect in any manner or way whatsoever the rights of Her Majesty, her heirs, or successors, unless it is expressly stated that Her Majesty shall be bound thereby.”

The Insolvent Acts are to be construed with reference to this provision, which is substantially an affirmation of the general principle of law already adverted to.

Applying that principle to the enactment in question, their Lordships are of opinion that, as it contains no words which purport to derogate from the prerogative of

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the Queen to allow, as an act of grace, appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect is unaffected by it.

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The order for leave to appeal granted in the present case will consequently stand.

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## [PRIVY COUNCIL.]

THE CITIZENS INSURANCE COMPANY OF } *Appellants,*  
 CANADA, .....

AND

WILLIAM PARSONS,..... *Respondent.*

THE QUEEN INSURANCE COMPANY,..... *Appellants,*

AND

WILLIAM PARSONS,..... *Respondent.*

*On Appeal from the Supreme Court of Canada.*

*(Reported 45 L. T. N. S., 721.)*

The power of the Dominion Parliament for the regulation of trade and commerce includes political arrangements in regard to trade, and regulations of trade in matters of interprovincial concern, and may perhaps include general regulations affecting the whole Dominion, but it does not comprehend the power to regulate the contracts of a particular business or trade (such as the business of fire insurance) in a single Province.

An Act of the Province of Ontario to secure uniform conditions in policies of fire insurance was held to be within the power of a Provincial Legislature over "property and civil rights."

Such an Act, so far as relates to insurance on property within the Province, may bind all fire insurance companies, whether incorporated by Imperial, Dominion, Provincial, Colonial or Foreign authority.

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\* Present:—Sir Barnes Peacock, Sir Montague Smith, Sir Robert P. Collier, Sir Richard Couch, and Sir Arthur Hobhouse.

\*J. C.

1881

July 7, 8, 9.  
 Nov. 26.

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A Dominion Act having required insurance companies to obtain licenses from the Minister of Finance as a condition to their carrying on the business of insurance in the Dominion, neither the Act, nor the fact of a company having obtained such license, was held to withdraw the company from the operation of the Provincial Act.

These were two appeals from judgments of the Supreme Court of Canada (1) Ritchie, C. J., Fournier and Henry, JJ., Taschereau and Gwynne, JJ., dissenting, which had affirmed the judgments of the Court of Appeal for Ontario (2) which had affirmed the judgments of the Queen's Bench (3), discharging rules *nisi* obtained by the present Appellants to set aside verdicts obtained by the present Respondent in two actions brought by him against the appellant companies.

The actions were brought upon contracts of fire insurance, and the facts, arguments, and sections of the Statutes referred to appear fully from the judgment of their Lordships.

The Solicitor-General (Sir F. Herschell), Mr. Benjamin, Q.C., Mr. Bethune, Q.C. (of the Canadian Bar), and Mr. Jeune, for the Appellants.

Sir J. Holker, Q.C., and Mr. A. L. Smith for the Respondent.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

Their Lordships gave judgment as follows:—

The questions in these appeals arise in two actions

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(1) 4 Can. S. U. R. 215; *post*, p. 284. (2) 4 App. Rep. (Ont.) 96, 103.

(3) 43 U. C. Q. B. 261, 271.

brought by the same plaintiff (the Respondent) upon contracts of insurance against fire of buildings situate in the Province of Ontario, in the Dominion of Canada.

The most important question in both appeals is one of those, already numerous, which have arisen upon the provisions of the B. N. A. Act, 1867, relating to the distribution of legislative powers between the Parliament of Canada and the Legislatures of the Provinces, and, owing to the very general language in which some of these powers are described, the question is one of considerable difficulty. Their Lordships propose to deal with it before approaching the facts on which the particular questions in the actions depend. It will only be necessary to premise that "The Citizens Insurance Company of Canada," the defendants in the first action, were originally incorporated by an Act of the late Province of Canada, 19 & 20 Vict. c. 124, by the name of "The Canada Marine Insurance Company." By another Act of the late Province, 27 & 28 Vict. c. 98, further powers, including the power of effecting contracts of insurance against fire, were conferred on the company, and its name changed to "The Citizens Insurance and Investment Company;" and, finally, by an Act of the Dominion Parliament, its name was again changed to the present title, and it was enacted that, by its new name, it should enjoy all the franchises, privileges, and rights, and be subject to all the liabilities of the company under its former name.

The Queen Insurance Company is an English fire and life insurance company incorporated under the provisions of the Joint Stock Companies' Act of the Imperial Parliament, 7 & 8 Vict. c. 110. It has its principal office in England, and carries on business in Canada.

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The defendant company in each of the actions is the Appellant.

The statute impeached by the Appellants, as being an excess of legislative power, is an Act of the Legislature of the Province of Ontario (39 Vict. c. 24), intituled "An Act to secure uniform Conditions in Policies of Fire Insurance."

The Preamble of the Act is as follows:—

"Whereas under the provisions of an Act passed in the 38th year of the reign of Her Majesty, intituled 'An Act to amend the Laws relating to Fire Insurances,' the Lieutenant-Governor issued a commission to certain Commissioners therein named, requiring them to consider and report what conditions are just and reasonable conditions to be inserted in fire insurance policies on real or personal property in this Province: And whereas a majority of the said Commissioners have, in pursuance of the requirements of the said Act, settled and approved of the conditions set forth in the schedule to this Act; and it is advisable that the same should be expressly adopted by the Legislature as the statutory conditions to be contained in policies of fire insurance entered into or in force in this Province."

It enacts as follows:—

"1. The conditions set forth in the Schedule to this Act shall, as against the insurers, be deemed to be part of every policy of fire insurance hereafter entered into, or renewed, or otherwise in force in Ontario, with respect to any property therein, and shall be printed on every such policy with the heading 'Statutory Conditions,' and if a Company (or other insurer) desire to vary the said conditions, or to omit any of them, or to add new conditions, there shall be added in conspicuous type, and in ink of different colour, words to the following effect:—

*Variations in Conditions.*

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““This policy is issued on the above statutory conditions, with the following variations and additions:—

““These variations (*or as the case may be*) are, by virtue of the Ontario Statute in that behalf, in force so far as, by the Court or Judge before whom a question is tried relating thereto, they shall be held to be just and reasonable to be exacted by the Company.’

“2. Unless the same is distinctly indicated and set forth in the manner or to the effect aforesaid, no such variation, addition, or omission shall be legal and binding on the insured; and no question shall be considered as to whether any such variation, addition, or omission is, under the circumstances, just and reasonable, and on the contrary the policy shall, as against the insurers, be subject to the statutory conditions only, unless the variations, additions, or omissions are distinctly indicated and set forth in the manner or to the effect aforesaid.

“3. A decision of a Court or Judge under this Act shall be subject to review or appeal to the same extent as a decision by such Court or Judge in other cases.”

The schedule contains twenty-one conditions under the head “Statutory Conditions.” The following of them are material to the particular questions to be decided in the appeals:—

“2. After application for insurance, it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the Company shall, in writing, point out the particulars wherein the policy differs from the application.”

“8. The Company is not liable for loss if there is any prior insurance in any other Company, unless the Company’s assent thereto appears therein, or is indorsed

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thereon, nor if any subsequent insurance is effected in any other Company, unless and until the Company assent thereto by writing, signed by a duly authorized agent."

"9. In the event of any other insurance on the property herein described having been assented to as aforesaid, then this Company shall, if such other insurance remain in force, on the happening of any loss or damage, only be liable for the payment of a ratable proportion of such loss or damage without reference to the dates of the different policies."

"10. The Company is not liable for the losses following, that is to say, among others:—

"(g) The Company is not liable for loss or damage occurring while petroleum," and various other enumerated substances, "or more than 25 pounds weight of "gunpowder, are stored or kept in the building insured, "or containing the property insured, unless permission "is given in writing by the Company."

The distribution of legislative powers is provided for by Sections 91 to 95 of the B. N. A. Act, 1867; the most important of these being Section 91, headed "Powers of "the Parliament," and Section 92, headed "Exclusive "Powers of Provincial Legislatures."

Section 91 is as follows:—

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters

coming within the classes of subjects next hereinafter enumerated, that is to say,—”

Then follows an enumeration of 29 classes of subjects.

The Section concludes as follows :—

“And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.”

Section 92 is as follows :—

“In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—”

Then follows an enumeration of 16 classes of subjects.

The scheme of this legislation, as expressed in the first branch of Section 91, is to give to the Dominion Parliament authority to make laws for the good government of Canada in all matters *not coming* within the classes of subjects assigned exclusively to the Provincial Legislature. If the 91st Section had stopped here, and if the classes of subjects enumerated in Section 92 had been altogether distinct and different from those in Section 91, no conflict of legislative authority could have arisen. The Provincial Legislatures would have had exclusive legislative power over the 16 classes of subjects assigned to them, and the Dominion Parliament exclusive power over all other matters relating to the good government of Canada. But it must have been foreseen that this sharp and definite distinction had not been and could not be attained, and that some of the classes of subjects assigned to the Provincial Legislatures unavoidably ran into and were embraced by some of the enumerated classes of subjects in Section 91; hence an endeavour

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appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, "for greater certainty, but not so as to restrict the generality of the foregoing terms of this section," that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of Section 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of Section 92.

Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in Section 91. It is evident that solemnization of marriage would come within this general description; yet "solemnization of marriage in the Province" is enumerated among the classes of subjects in Section 92, and no one can doubt, notwithstanding the general language of Section 91, that this subject is still within the exclusive authority of the Legislatures of the Provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in Section 91; but, though the description is sufficiently large and general to include "direct taxation within the Province, in order to the raising of a revenue for Provincial purposes," assigned to the Provincial Legislatures by Section 92, it obviously

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A.C. 1896 p 359*

could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in Section 91, legislative power may reside as to some matters falling within the general description of these subjects in the Legislatures of the Provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each Legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the language of the two sections must be read together, and that of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

The first question to be decided is, whether the Act impeached in the present appeals falls within any of the classes of subjects enumerated in Section 92, and assigned exclusively to the Legislatures of the Provinces; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the Provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated

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classes of subjects in Section 91, and whether the power of the Provincial Legislature is or is not thereby overborne.

The main contention on the part of the Respondent was that the Ontario Act in question had relation to matters coming within the class of subjects described in No. 18 of Section 92, viz., "Property and Civil Rights in the Province." The Act deals with policies of insurance entered into or in force in the Province of Ontario for insuring property situate therein against fire, and prescribes certain conditions which are to form part of such contracts. These contracts, and the rights arising from them, it was argued, came legitimately within the class of subject, "Property and Civil Rights." The Appellants, on the other hand, contended that civil rights meant only such rights as flowed from the law, and gave as an instance the *status* of persons. Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words "civil rights." The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in any of the enumerated classes of subjects in Section 91.

It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in Sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intentment be modified and limited. In looking at Section 91, it will be found not only that there is no class including, generally, contracts and the rights arising from them, but that one class of contracts is mentioned and enu-

merated, viz., "18, Bills of exchange and promissory notes," which it would have been unnecessary to specify if authority over all contracts and the rights arising from them had belonged to the Dominion Parliament.

The provision found in Section 94 of the B. N. A. Act, which is one of the sections relating to the distribution of legislative powers, was referred to by the learned Counsel on both sides as throwing light upon the sense in which the words "property and civil rights" are used. By that section the Parliament of Canada is empowered to make provision for the uniformity of any laws relative to "property and civil rights" in Ontario, Nova Scotia, and New Brunswick, and to the procedure of the Courts in these three Provinces, if the Provincial Legislatures choose to adopt the provisions so made. The Province of Quebec is omitted from this section for the obvious reason that the law which governs property and civil rights in Quebec is in the main the French law, as it existed, at the time of the cession of Canada, and not the English law which prevails in the other Provinces. The words "property and civil rights" are, obviously, used in the same sense in this section as in No. 18 of Section 92, and there seems no reason for presuming that contracts and the rights arising from them were not intended to be included in this provision for uniformity. If, however, the narrow construction of the words, "civil rights," contended for by the Appellants, were to prevail, the Dominion Parliament could, under its general power, legislate in regard to contracts in all and each of the Provinces, and, as a consequence of this, the Province of Quebec, though now governed by its own Civil Code, founded on the French law, as regards contracts and their incidents, would be subject to have its law on that subject altered by the Dominion Legislature, and brought into uniformity with the English law prevailing in the

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other three Provinces, notwithstanding that Quebec has been carefully left out of the uniformity section of the Act.

It is to be observed that the same words, "civil rights," are employed in the Act of 14 Geo. III., c. 89, which made provision for the Government of the Province of Quebec. Section 8 of that Act enacted, that His Majesty's Canadian subjects within the Province of Quebec should enjoy their property, usages, and other civil rights, as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of Canada, and be determined agreeably to the said laws. In this Statute the words "property" and "civil rights" are plainly used in their largest sense; and there is no reason for holding that in the Statute under discussion they are used in a different and narrower one.

The next question for consideration is whether, assuming the Ontario Act to relate to the subject of property and civil rights, its enactments and provisions come within any of the classes of subjects enumerated in Section 91. The only one which the Appellants suggested as expressly including the subject of the Ontario Act is No. 2, "the regulation of trade and commerce."

A question was raised which led to much discussion in the Courts below and at this bar, viz., whether the business of insuring buildings against fire was a trade. This business, when carried on for the sake of profit, may, no doubt, in some sense of the word be called a trade. But contracts of indemnity made by insurers can scarcely be considered trading contracts, nor were insurers who made them held to be "traders" under the English bankruptcy laws; they have been made subject to those laws by special description. Whether

the business of fire insurance properly falls within the description of a "trade" must, in their Lordships' view, depend upon the sense in which that word is used in the particular Statute to be construed; but in the present case their Lordships do not find it necessary to rest their decision on the narrow ground that the business of insurance is not a trade.

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The words "regulation of trade and commerce," in their unlimited sense, are sufficiently wide, if uncontrolled by the context and other parts of the Act, to include every regulation of trade ranging from political arrangements in regard to trade with foreign Governments, requiring the sanction of Parliament, down to minute rules for regulating particular trades. But a consideration of the Act shews that the words were not used in this unlimited sense. In the first place, the collocation of No. 2 with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the mind of the Legislature when conferring this power on the Dominion Parliament. If the words had been intended to have the full scope of which in their literal meaning they are susceptible, the specific mention of several of the other classes of subjects enumerated in Section 91 would have been unnecessary; as, 15, banking; 17, weights and measures; 18, bills of exchange and promissory notes; 19, interest; and even 21, bankruptcy and insolvency.

"Regulation of trade and commerce" may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (6 Anne, c. 11), and as these words have been used in other Acts of State. Article V. of the Act of Union enacted that all the subjects of the United Kingdom should have "full freedom and intercourse of trade

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and navigation " to and from all places in the United Kingdom and the Colonies ; and Article VI. enacted that all parts of the United Kingdom, from and after the Union, should be under the *same* " prohibitions, restrictions, and *regulations of trade.*" Parliament has at various times since the Union passed laws affecting and regulating specific trades in one part of the United Kingdom only, without its being supposed that it thereby infringed the Articles of Union. Thus the Acts for regulating the sale of intoxicating liquors notoriously vary in the two kingdoms. So with regard to Acts relating to bankruptcy, and various other matters.

Construing, therefore, the words " regulation of trade and commerce " by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance, in a single Province, and therefore that its legislative authority does not in the present case conflict or compete with the power over property and civil rights assigned to the Legislature of Ontario by No. 18 of Section 92.

Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion Parliament,

might legally modify or affect property and civil rights in the provinces, or the legislative power of the Provincial Legislatures in relation to those subjects. Questions of this kind, it may be observed, arose and were treated of by this Board in the cases of *L'Union St. Jacques de Montreal v. Belisle* (1), and *Cushing v. Dupuy* (2).

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It was contended, in the case of the Citizens Insurance Company of Canada, that the company having been originally incorporated by the Parliament of the late Province of Canada, and having had its incorporation and corporate rights confirmed by the Dominion Parliament, could not be affected by an Act of the Ontario Legislature. But the latter Act does not assume to interfere with the constitution or status of corporations. It deals with all insurers alike, including corporations and companies, whatever may be their origin, whether incorporated by British authority, as in the case of the Queen Insurance Company, or by foreign or colonial authority, and without touching their status, requires that if they choose to make contracts of insurance in Ontario, relating to property in that Province, such contracts shall be subject to certain conditions.

It was further urged that the Ontario Act was repugnant to the Act of the late Province of Canada, which empowered the company to make contracts for assurance against fire "upon such conditions as might be bargained for and agreed upon between the company and the assured." But this is, in substance, no more than an expanded description of the business the company was empowered to transact, viz., to make contracts of assurance against fire, and can scarcely be regarded as inconsistent with the specific legislation regarding such contracts contained in the Act in question.

It was further argued on the part of the Appellants

(1) L. R. 6 P. C. 31; *ante* p. 63. (2) 5 App. Cas. 409; *ante* p. 252.

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that the Ontario Act was inconsistent with the Act of the Dominion Parliament, 88 Vict. c. 20, which requires fire insurance companies to obtain licenses from the Minister of Finance as a condition to their carrying on the business of insurance in the Dominion, and that it was beyond the competency of the Provincial Legislature to subject companies who had obtained such licenses, as the appellant companies had done, to the conditions imposed by the Ontario Act. But the legislation does not really conflict or present any inconsistency. The statute of the Dominion Parliament enacts a general law applicable to the whole Dominion, requiring all insurance companies, whether incorporated by foreign, Dominion, or Provincial authority, to obtain a license from the Minister of Finance, to be granted only upon compliance with the conditions prescribed by the Act. Assuming this Act to be within the competency of the Dominion Parliament as a general law applicable to foreign and domestic corporations, it in no way interferes with the authority of the Legislature of the Province of Ontario to legislate in relation to the contracts which corporations may enter into in that Province. The Dominion Act contains the following provision, which clearly recognizes the right of the Provincial Legislature to incorporate insurance companies for carrying on business within the Province itself:—

“But nothing herein contained shall prevent any insurance company incorporated by or under any Act of the Legislature of the late Province of Canada, or of any Province of the Dominion of Canada, from carrying on any business of insurance within the limits of the late Province of Canada, or of such Province only, according to the powers granted to such insurance company within such limits as aforesaid, without such license as hereinafter mentioned.”

This recognition is directly opposed to the construction

sought to be placed by the Appellants' Counsel on the words "provincial objects" in No. 11 of Section 92,—"the incorporation of companies with Provincial objects," by which he sought to limit these words to "public" Provincial objects, so as to exclude insurance and commercial companies.

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Chief Justice Ritchie refers to an equally explicit recognition of the power of the Provinces to incorporate insurance companies contained in an earlier Act of the Dominion Parliament (31 Vict. c. 48) which was passed shortly after the establishment of the Dominion.

The learned Chief Justice also refers to a remarkable section contained in the Act of the Dominion Parliament consolidating certain Acts respecting insurance, 40 Vict. c. 42. Section 28 of that Act is as follows:—

"This Act shall not apply to any company within the exclusive legislative control of any one of the Provinces of Canada, unless such company so desires; and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall then have the power of transacting its business of insurance throughout Canada."

This provision contains a distinct declaration by the Dominion Parliament that each of the Provinces had exclusive legislative control over the insurance companies incorporated by it, and therefore is an acknowledgment that such control was not deemed to be an infringement of the power of the Dominion Parliament as to "the regulation of trade and commerce."

The declarations of the Dominion Parliament are not, of course, conclusive upon the construction of the B. N. A. Act; but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered.

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The opinions of the majority of the Judges in Canada, as summed up by Chief Justice Ritchie, are in favour of the validity of the Ontario Act. In the present action, the Court of Queen's Bench and the Court of Appeal of Ontario unanimously supported its legality; and the Supreme Court of Canada, by a majority of three Judges to two, have affirmed the judgment of the Provincial Courts. The opinions of the learned Judges of the Supreme Court are stated with great fulness and ability, and clearly indicate the opposite views which may be taken of the Act, and the difficulties which surround any construction that may be given to it.

Mr. Justice Taschereau, in the course of his vigorous judgment, sought to place the plaintiff in the action against the Citizens Company in a dilemma. He thinks that the assertion of the right of the Province to legislate with regard to the contracts with insurance companies amounts to a denial of the right of the Dominion Parliament to do so, and that this is, in effect, to deny the right of that Parliament to incorporate the Citizens Company, so that the plaintiff was suing a non-existent defendant. Their Lordships cannot think that this dilemma is established. The learned Judge assumes that the power of the Dominion Parliament to incorporate companies to carry on business in the Dominion is derived from one of the enumerated classes of subjects, viz., "the regulation of trade and commerce," and then argues that if the authority to incorporate companies is given by this clause, the exclusive power of regulating them must also be given by it, so that the denial of one power involves the denial of the other. But, in the first place, it is not necessary to rest the authority of the Dominion Parliament to incorporate companies on this specific and enumerated power. The authority would belong to it by its general power over all matters not coming within the classes of subjects assigned exclusively

to the Legislatures of the Provinces, and the only subject on this head assigned to the Provincial Legislature being "the incorporation of companies with Provincial objects," it follows that the incorporation of companies for objects other than Provincial falls within the general powers of the Parliament of Canada. But it by no means follows (unless indeed the view of the learned Judge is right as to the scope of the words "the regulation of trade and commerce") that because the Dominion Parliament had alone the right to create a corporation to carry on business throughout the Dominion; that it alone has the right to regulate its contracts in each of the Provinces. Suppose the Dominion Parliament were to incorporate a company, with power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended, if such a company were to carry on business in a Province where a law against holding land in mortmain prevailed (each Province having exclusive legislative power over "property and civil rights in the Province"), that it could hold land in that Province in contravention of the Provincial legislation; and, if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the Provinces having passed Mortmain Acts, though the corporation would still exist and preserve its status as a corporate body.

On the best consideration they have been able to give to the arguments addressed to them and to the judgments of the learned Judges in Canada, their Lordships have come to the conclusion that the Act in question is valid.

[The remainder of the judgment which relates only to the construction of the Act of the Legislature of Ontario, 39 Vict. c. 24, is omitted.]

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# JUDGMENTS IN SUPREME COURT OF CANADA.

[Reported 4 Can. S.C.R. 215.]

RITCHIE, C. J.:—

There never, probably, was an Act, the validity of which was questioned, that came before a court so strongly supported by judicial and legislative authority as this Act. It was legislation suggested as necessary by the Court of Queen's Bench of Ontario, in the case of *Smith v. Commercial Union Insurance Co.* (1).

The Legislature of Ontario, adopting the suggestion, passed 38 Vict. c. 65, authorizing the issue of a commission to three or more persons holding judicial office in the Province, and by section 2, enacted in these words that :

"A commission is to be issued by the Lieutenant-Governor, addressed to three or more persons holding judicial office in this Province, for the purpose of determining what conditions of a fire insurance policy are just and reasonable conditions, and the commissioners may take evidence, and are to hear such parties interested as they shall think necessary ; and a copy of the conditions settled, approved of and signed by the Commissioners, or a majority of them, shall be deposited in the office of the Provincial Secretary ; and in case, after the Lieutenant-Governor, by proclamation published in the *Ontario Gazette*, assent to the said conditions, any policy is entered into or renewed, containing or including any conditions other than or different from the conditions so previously approved of and deposited ; and if the said condition, so not contained or included, is held by the court or judge before whom a question relating thereto is tried, not to be just and reasonable, such condition shall be null and void."

This Act was not disallowed, and a commission by the Government of Ontario was duly issued in accordance therewith to learned judges, who reported what they deemed just and reasonable conditions, whereupon the Ontario Legislature passed the 39 Vict. c. 24 ; "An Act to secure uniform conditions in Policies of Fire Insurance," which is the Act now questioned, and which, after reciting that under the provisions of the Act 38 Vict. c. 65, the Lieutenant-Governor issued a commission to consider and report what conditions are just and reasonable conditions to be inserted in fire insurance policies, on real or personal property, in this Prov-

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(1) 33 U. C. Q. B. 69.

ince (Ontario), and, after reciting that a majority of the Com-  
mission had settled and approved of the conditions set forth in the  
schedule of the Act, and that it was advisable that the same should  
be expressly adopted by the Legislature as the statutory conditions  
to be contained in the policies of fire insurance entered into, or in  
force in this Province, the first sections enact :—

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“ 1. The conditions set forth in the schedule to this Act shall, as  
against the insurers, be deemed to be part of every policy of fire  
insurance hereafter entered into or renewed, or otherwise in force in  
Ontario with respect to any property therein, and shall be printed  
on every such policy with the heading ‘Statutory Conditions;’  
and if a company (or other insurer) desire to vary the said con-  
ditions, or to omit any of them, or to add new conditions, there  
shall be added, in conspicuous type, and in ink of different colour,  
words to the following effect: ‘Variations in Conditions.’

“ This policy is issued on the above statutory conditions, with  
the following variations and additions :—These variations (or as  
the case may be) are, by virtue of the Ontario statute in that be-  
half, in force so far as, by the court or judge before whom a ques-  
tion is tried relating thereto, they shall be held to be just and  
reasonable to be exacted by the company.

“ 2. Unless the same is distinctly indicated and set forth in the  
manner or to the effect aforesaid, no such variation, addition or  
omission shall be legal and binding on the insured, and no question  
shall be considered as to whether any such variation, addition or  
omission is, under the circumstances, just and reasonable, and, on  
the contrary, the policy shall, as against the insurers, be subject to  
the statutory conditions only, unless the variations, additions or  
omissions are distinctly indicated and set forth in the manner or  
to the effect aforesaid.”

This Act was never disallowed, but has since its passage been  
acted on; and the Ontario reports show that questions as to its  
construction have been before the courts of Ontario, without its  
validity having been impugned by either bench or bar, and, when  
the point was raised, its validity was affirmed by the unanimous  
opinion of the court to whom the question was first submitted; it  
was so held and acquiesced in in two cases unappealed from, and,  
when again raised in the present cases, the Court of Queen's Bench  
unanimously reaffirmed its former decision, and, on appeal, the  
Appeal Court of Ontario unanimously affirmed that decision. But  
this is not all; we have the Dominion Parliament recognizing, by

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expressed statutory terms the right of the Local Legislature to incorporate Insurance Companies and deal with insurance matter.

So far back as the 31 Vict. c. 48 (1868), when the intention of the Parliament of Great Britain, in enacting the B. N. A. Act, must have been fresh in the minds of the leading men who first sat in the Dominion Parliament, and who had taken the most prominent part in discussing and agreeing on the terms of Confederation and the provisions of the B. N. A. Act, and who, we historically know, watched its passage through the Parliament of Great Britain, we find the Dominion Parliament in that year (1868) passing "An Act respecting Insurance Companies," and in that Act, by section 4, thus clearly affirming the right of the Local Legislature to incorporate Insurance Companies, after fixing the amount to be deposited by Life, Fire, Inland Marine, Guarantee or Accident Insurance Companies, certain companies are excepted in these words:—

"Except only in the case of companies incorporated before the passing of this Act by Act of the Parliament of Canada, or of the Legislature of any of the late Provinces of Canada, or Lower Canada or Upper Canada, or of Nova Scotia or New Brunswick, or which may have been or may hereafter be incorporated by the Parliament of Canada, or by the Legislature of any Province of the Dominion, and carrying on the business of Life or Fire Insurance."

And, as if to place this beyond all doubt, and to shew that companies, which might be so incorporated by the Local Legislature, were local incorporations, and its business should be confined within the Province incorporating them, we find it enacted in section 25:—

"That the provisions of this Act as to deposit and issue of license shall not apply to any Insurance Company incorporated by any Act of the Legislature of the late Province of Canada, or incorporated, or to be incorporated, under any Act of any one of the Provinces of Ontario, Quebec, Nova Scotia, or New Brunswick, so long as it shall not carry on business in the Dominion beyond the limits of that Province by the Legislature or Government of which it was incorporated, but it shall be lawful for any such company to avail itself of the provisions of this Act."

Could words or provisions in recognition and affirmance of the powers of the Local Legislatures be stronger? And in 38 Vict. c. 20 (1875), "An Act to amend and consolidate the several Acts respecting insurance, in so far as regards Fire and Inland Marine business," we find, by section 2, a distinct recognition of companies incorporated under any Act of the Legislature of any Province of the Dominion of Canada:

"Section 2.—This Act shall apply only to companies heretofore incorporated by any Act of the Legislature of the late Province of Canada, or by any Act of the Legislature of any of the Provinces of Canada, and which, upon the day of the passing of this Act, were also licensed, under Act of the Parliament of Canada, to transact business of insurance in Canada, and also to any company heretofore or which may hereafter be incorporated by Act of Parliament of Canada, and to any foreign Insurance Company as hereinbefore defined; and it shall not be lawful for the Minister of Finance to license any other company than those in this section above mentioned; and no other company than those above mentioned shall do any business of fire or inland marine insurance throughout the Dominion of Canada; but nothing herein contained shall prevent any Insurance Company incorporated by, or under, any Act of the Legislature of the late Province of Canada, or of any Province of the Dominion of Canada, from carrying on any business of insurance within the limits of the late Province of Canada or of such Province only, according to the powers granted to such Insurance Company within such limits as aforesaid, without such license as hereinafter mentioned."

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But the Dominion statutory recognition of the rights of local legislation, strong as it is, does not rest here. As late as 1877, by the 40 Vict. c. 42, "An Act to amend and consolidate certain Acts respecting insurance," we find it thus enacted by section 28:

"This Act shall not apply to any company within the exclusive legislative control of any one of the Provinces of Canada unless such company so desires, and it shall be lawful for any such company to avail itself of the provisions of this Act, and if it do so avail itself, such company shall have the power of transacting its business of insurance throughout Canada."

So again, in the year 1878, the Dominion Parliament distinctly recognized the incorporation by the Ontario Legislature of the *Ontario Mutual Life Assurance Company*, incorporated and carrying on business in the Province of Ontario, under the Act, c. 17 of the statutes of said Province, passed in the 32 Vict., and incorporated the said company to enable it to carry on business of life assurance on the mutual principle, and doing all things appertaining thereto or connected therewith, as well in the said Province of Ontario as in the other Provinces of the Dominion.

We find, then, legislation in the direction carried out by this Act recommended in a solemn judgment of the Queen's Bench of Ontario; we find the matter referred to a commission of judges

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who reported to the Government of Ontario the conditions and provisions which, in their opinion, should be enacted by the Legislature of that Province, and form, as against the insured, the statutory conditions of a policy of insurance in force in Ontario with respect to any property therein, and the means necessary to be adopted by the insured if he desire to omit or vary any of such conditions. Here, then, we have the Legislature of Ontario assuming the right to deal with Insurance Companies and insurance business, and their legislative action not disallowed. We find this particular Act in several cases acted upon by the bar and bench of Ontario without its validity being questioned by either, and when at last questioned, we find its validity sustained by all courts and judges of original jurisdiction who have been called on to adjudicate on this point, and, finally, by the unanimous opinion of the Court of Appeal; and last, but not least, we have the express legislation of the Parliament of Canada, expressly recognizing that the Local Legislatures have power to deal with matters of insurance.

I do not put forward these considerations as conclusive of the questions in this Court of Appeal, because if we were clearly of opinion that under the B. N. A. Act the Legislature of Ontario had not the power to pass the law, we would be bound to say so, and to overrule the decisions of the courts below and disregard the legislation of the Dominion Parliament, for, if not within the B. N. A. Act, neither the affirmance of the power by the Local Legislature nor the legislative recognition of it by the Dominion Parliament could confer it. Still, I am individually well pleased that I am enabled satisfactorily to arrive at a conclusion which relieves me from the necessity of overruling the acts and decisions of so many learned judges, and the legislative actions of the Legislature of Ontario and the repeated statutory declarations of the Parliament of Canada.

But this does not relieve me from the duty of shewing immediately to the parties interested, and through them to the Parliament of Canada and the Legislatures of the Provinces, by what process of reasoning I have arrived at that conclusion.

Is, then, such legislation as this with respect to the contract of insurance beyond the power of local legislation? I think at the outset I may affirm with confidence that the B. N. A. Act recognizes in the Dominion constitution and in the Provincial constitutions a legislative sovereignty, if that is a proper expression to use,

as independent and as exclusive in the one as in the other over the matters respectively confided to them, and the powers of each must be equally respected by the other, or *ultra vires* legislation will necessarily be the result.

It is contended that the Local Legislature not only cannot incorporate a local Insurance Company, but cannot pass any Act in reference to insurance, inasmuch as it is contended such legislation belongs exclusively to the Dominion Parliament, under the power given that Parliament to legislate in relation to "the regulation of trade and commerce."

As to the incorporation of Insurance Companies, this point is not directly, though it is perhaps indirectly, involved in the questions raised in these cases. It may be remarked that, in the enumeration of the powers of Parliament, the only express reference to the power of incorporation is under No. 15, "Incorporation of Banks," though it cannot be doubted that under its general power of legislation, it has the power to incorporate companies with Dominion objects.

But it is said that Insurance Companies are trading or commercial companies, and therefore within the terms "trade and commerce;" but we have matters connected with trade and commerce, such as navigation and shipping, banking incorporations, weights and measures, and insolvency, and "such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," and these and the other enumerated classes of subjects "shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

This shews inferentially that there may be matters of a local and private nature with which the Local Legislatures may deal, and which, but for the exclusive power conferred on the Local Legislatures, might be comprised under some of the general heads set forth in sect. 91, as belonging to the Dominion Parliament. This is made very apparent in respect to navigation and shipping.

By sect. 91 the exclusive legislative authority of the Parliament of Canada is declared to extend to all matters coming within the classes of subjects next thereafter enumerated, of which "navigation and shipping" is one. When we turn to the enumeration of the exclusive powers of the Provincial Legislatures, we find

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"local works and undertakings, other than such as are of the following classes: (a) Lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province; (b) Lines of steam ships between the Province and any British or foreign country; (c) Such works as, although wholly situate within the Province, are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces"—and then follows "the incorporation of companies with Provincial objects."

Here, then, are matters immediately connected with navigation and shipping, trade and commerce.

If the power to legislate on navigation and shipping, and trade and commerce, vested in the Dominion Parliament, necessarily excluded from Local Legislatures all legislation in connection with the same matters, and that nothing in relation thereto could be held to come under local works and undertakings, or property or civil rights, or generally all matters of a merely local or private nature in the Province, or the incorporation of companies with Provincial objects, what possible necessity could there be for inserting the exception "other than such as are of the following classes" as above (a, b, c)? On the contrary, does not this exception shew beyond all doubt, by irresistible inference, that there are matters connected with navigation and shipping, and with trade and commerce, that the Local Legislatures may deal with, and not encroach on the general powers belonging to the Dominion Parliament for the regulation of trade and commerce, and navigation and shipping, as well as railways, canals and telegraphs? Can it be successfully contended that this is not a clear intimation that the Local Legislatures were to have, and have, power to legislate in reference to lines of steamers and other ships, railways, canals, and other works and undertakings wholly within the Province, subject, no doubt, to the general powers of Parliament over shipping and trade and commerce, and the Dominion laws enacted under such powers, as, for instance, the 31 Vict. c. 65 (1868), "An Act respecting the inspection of steamboats, and for the greater safety of passengers by them," or the Act 36 Vict. c. 128, "An Act relating to shipping?"

With reference to Insurance Companies, and the business of insurance in general, it is contended that Insurance Companies are

trading companies, and therefore the business they transact is purely matter of trade and commerce, and therefore Local Legislatures cannot in any way legislate either in reference to Insurance Companies or insurance business.

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As to such a company being a trading company, Jessel, M. R., in the case of *in re Griffith* (1), did not seem to think the question so abundantly clear as is supposed. He says :

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"I come now to the next point, which is, what is this company? Is it a 'trading or other public company?' . . .

"So that we have it that it must be a public company, whether it is a trading company or other company. Therefore it becomes immaterial to consider whether a particular company is or is not a trading company, and I am glad of it, because, though I think an Insurance Company might be called a trading company, many people might take the opposite view of the word 'trade.' I take the larger view, and think it would be called a trading company, but it is immaterial. If it is a public company at all, and not a trading company, it comes under the term 'other public company.'" (2)

But in the view I take of this case, I am willing to assume that Insurance Companies may be considered trading companies, and yet that it by no means follows that the legislation complained of is beyond the powers of the Local Legislatures.

With reference to sect. 91, and the classes of subjects therein enumerated, Lord Selborne, in *L'Union St. Jacques de Montreal v. Belisle* (3), says :

"Their Lordships observe that the scheme of enumeration in that section is to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated, except what may properly be described as general legislation."

It may be difficult to draw the exact line between the powers of the Dominion Parliament to regulate trade and commerce and the powers of the Local Legislatures over "local works and undertakings," "property and civil rights in the Province," and "generally all matters of a merely local or private nature in the Province."

(1) 12 Ch. D. 655, 663.

(2) See also *Paul v. Virginia*, 8 Wallace, 168, where it was held that issuing a policy of insurance was not a transaction of trade and commerce.

(3) L. R. 6 P. C. at p. 36; *ante*, pp. 69, 70.



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No one can dispute the general power of Parliament to legislate as to "trade and commerce," and that where, over matters with which Local Legislatures have power to deal, local legislation conflicts with an Act passed by the Dominion Parliament in the exercise of any of the general powers confided to it, the legislation of the Local must yield to the supremacy of the Dominion Parliament; in other words, that the Provincial legislation in such a case must be subject to such regulations, for instance, as to trade and commerce of a commercial character, as the Dominion Parliament may prescribe. I adhere to what I said in *Valin v. Langlois* (1), that the property and civil rights referred to were not all property and all civil rights, but that the terms "property and civil rights" must necessarily be read in a restricted and limited sense, because many matters involving property and civil rights are expressly reserved to the Dominion Parliament, and that the power of the Local Legislatures was to be subject to the general and special legislative powers of the Dominion Parliament, and to what I there added: "But while the legislative rights of the Local Legislatures are in this sense subordinate to the right of the Dominion Parliament, I think such latter right must be exercised, so far as may be, consistently with the right of the Local Legislatures; and, therefore, the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada."

I think the power of the Dominion Parliament to regulate trade and commerce ought not to be held to be necessarily inconsistent with those of the Local Legislatures to regulate property and civil rights in respect to all matters of a merely local and private nature, such as matters connected with the enjoyment and preservation of property in the Province, or matters of contract between parties in relation to their property or dealings, although the exercise by the Local Legislatures of such powers may be said remotely to affect matters connected with trade and commerce, unless, indeed, the laws of the Provincial Legislatures should conflict with those of the Dominion Parliament passed for the general regulation of trade and commerce. I do not think the Local Legislatures are to be deprived of all power to deal with property and civil rights, because

Parliament, in the plenary exercise of its power to regulate trade and commerce, may possibly pass laws inconsistent with the exercise by the Local Legislatures of their powers—the exercise of the powers of the Local Legislatures being in such a case subject to such regulations as the Dominion may lawfully prescribe.

The Act now under consideration is not, in my opinion, a regulation of trade and commerce; it deals with the contract of fire insurance, as between the insurer and the insured. That contract is simply a contract of indemnity against loss or damage by fire, whereby one party, in consideration of an immediate fixed payment, undertakes to pay or make good to the other any loss or damage by fire, which may happen during a fixed period to specified property, not exceeding the sum named as the limit of insurance. In *Dalby v. The India and London Life Assurance Co.* (1), Parke, B., delivering the judgment of the court, says:

“The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life—the amount of the annuity being calculated, in the first instance, according to the probable duration of the life: and, when once fixed, it is constant and invariable. . . . This species of insurance in no way resembles a contract of indemnity.”

How this, as between the parties to the contract, can be called a matter of trade and commerce, I must confess my inability to comprehend; but the process of reasoning, as I understand it, by which we are asked to say that fire insurance is a matter of trade and commerce, would make life assurance equally so.

In this same case, Parke, B., says:

“Policies of assurance against fire and against marine risks are both properly contracts of indemnity—the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 Geo. II. c. 37, and put an end to in all except a few cases. But at common law, before this statute with respect to maritime risks, and the 14 Geo. III. c. 48, as to insurances on lives, it is perfectly clear that all contracts for wager policies, and wagers which were not contrary to the policy of the law, were legal contracts,

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and so it is stated by the court in the case of *Cousins v. Nantes* (1), to have been solemnly determined in *Lucena v. Craufurd* (2), without even a difference of opinion among all the judges. To the like effect was the decision of the Court of Error in Ireland, before all the judges except three, in *The British Insurance Co. v. Magee* (3), that the insurance was legal at common law." (4)

I do not understand that by the Act now assailed any supreme sovereign legislative power to regulate and control the business of insurance in Ontario is claimed. As I read the Act, it deals only with this contract of indemnity; it does not profess to deal with trade or commerce, or to make any regulation in reference thereto. In my opinion, this Act has no reference to trade and commerce in the sense in which these words are used in the B. N. A. Act. It is simply an exercise of the power of the Local Legislature for the protection of property in Ontario, and the civil rights of the proprietors thereof in connection therewith, by securing a reasonable and just contract in favour of parties insuring property, real or personal, in Ontario, and deals therefore only with a matter of a local and private nature. The scope and object of the Act is to secure to parties insuring a just and reasonable contract, to prevent the exaction of unjust and unreasonable conditions, and to protect parties from being imposed upon by the insertion of conditions and stipulations in such a way as not to be brought to the immediate notice of the insured, or capable of being easily understood, or by the insertion of conditions calculated practically in many cases to deprive the parties paying the premiums of indemnity, though justly entitled to it, and, if the statutory conditions are omitted or varied, to compel the terms of the contract to be so plainly and prominently put on the contract that the attention of the assured may be called to them, and so that he may not be misled, judicial experience having proved that the rights of the insured, and legitimate indemnity in return for the money paid, demanded that the insured should be thus protected.

As the case of *Smith v. Commercial Union Insurance Company* (5) proves that the judicial tribunals found that legislative protection was required in Ontario against unreasonable and unjust conditions

(1) 3 Taunt. 513. (2) 2 B. & P. 324. (3) C. & AL. 182.

(4) See also *The Edinburgh Life Assurance Co. v. The Solicitor of Inland Revenue*, and *The Scottish Widows' Fund and Life Assurance Co.* 12 Sc. L. Reporter, 275; and *Bank of India v. Wilson*, 3 Ex. D. 108.

(5) 33 U. C. Q. B. 69.

imposed on the assured by the assurers; should experience shew that over-insurance was of frequent occurrence, and led to fraudulent burning, whereby not only fraud was encouraged, but the neighbouring properties of innocent parties, wholly unconnected with the insurance, were jeopardized, can it be said that it would be *ultra vires* for the Legislature of a Province, with a view to stop such practices, to enact that in every case of over-insurance, whether intentional or unintentional, the policy should be void, or to make any other provisions in reference to the contract of insurance as to value as would, in the opinion of the Local Legislature, prevent frauds and protect property? Could such legislation be held to be *ultra vires*, as being an interference with trade and commerce, because it dealt with the subject of insurance? Or for preventing frauds and perjuries, would it be *ultra vires* for the Local Legislature to enact that, as to all contracts of insurance entered into in Ontario, no insurance on any building or property in Ontario should be binding, or valid in law or equity, unless in writing? Or, take the first section of the 38 Vict. c. 65, can it be that the Local Legislature cannot make provision to provide against a failure of justice and right by enacting, as the first section of that Act did, that:

“Where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this Province as to the proof to be given to the Insurance Company after the occurrence of a fire have not been strictly complied with; or where, after a statement or proof of loss has been given in good faith by or on behalf of the insured, in pursuance of any proviso or condition of such contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not, within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time; or where, for any other reason, the court or judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions; no objection to the sufficiency of such statement or proof, or amended or supplemental statement or proof (as the case may be) shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance where-

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ever entered into; but this section shall not apply where the fire has taken place before the passing of this Act."

How can this be said to be an interference with the general regulation of trade and commerce? Yet it deals as effectually with the matter or contract of insurance in these particulars as this Act does in reference to the matters with which it deals. If the legislative power of the Provincial Legislatures is to be restricted and limited, as it is claimed it should be, and the doctrine contended for in this case, as I understand it, is carried to its legitimate logical conclusion, the idea of the power of the Local Legislature to deal with the local works and undertakings, property and civil rights, and matters of a merely local and private nature in the Province, is, I humbly think, to a very great extent, illusory.

I scarcely know how one could better illustrate the exercise of the power of the Local Legislatures to legislate with reference to property and civil rights, and matters of a merely local and private nature, than by a local Act of Incorporation, whereby a right to hold or deal with real or personal property in a Province is granted, whereby the civil right to contract and sue and to be sued as an individual in reference thereto is also granted. If a Legislature possesses this power, as a necessary sequence it must have the right to limit and control the manner in which the property may be so dealt with; and as to the contracts in reference thereto, the terms and conditions on which they may be entered into, whether they may be verbal, or shall be in writing, whether they shall contain conditions for the protection or security of one or other or both the parties, or that they may be free to deal as may be agreed on by the contracting parties without limit or restriction.

Inasmuch, then, as this Act relates to property in Ontario, and the subject-matter dealt with is therefore local, and as the contract between the parties is of a strictly private nature, and as the matters thus dealt with are therefore, in the words of the B. N. A. Act, "of a merely local or private nature in the Province," and as contracts are matters of civil rights and breaches thereof are civil wrongs, and as the property and civil rights in the Province only are dealt with by the Act, and as "property and civil rights in the Province" are in the enumeration of the "exclusive powers of Provincial Legislatures," I am of opinion that the Legislature of Ontario, in dealing with these matters in the Act in question, did not exceed their legislative powers.

I am happy to say I can foresee, and I fear, no evil effects what-

ever, as has been suggested, as likely to result to the Dominion from this view of the case. On the contrary, I believe that while this decision recognizes and sustains the legislative control of the Dominion Parliament over all matters confided to its legislative jurisdiction, it at the same time preserves to the Local Legislatures those rights and powers conferred on them by the B. N. A. Act, and which a contrary decision would, in my opinion, in effect, substantially, or to a very large extent, sweep away.

I carefully and advisedly abstain from expressing any opinion as to the validity or invalidity of any Act of the Dominion of Canada, or of the Province of Ontario, save only as to the Act now immediately under consideration. It will be time enough to discuss and decide on the validity of other statutes, whether Dominion or Provincial, when properly brought before us for judicial decision. To do so now, or to express any opinion as to the effect of this decision on other legislation not before us, and without argument or judicial investigation and consideration, would be, in my opinion, extra-judicial.

As to the construction which my brother Gwynne has put on section 3 of the Act, in the case of *Geraldi and Provincial Insurance Company* (1), though the arguments used by him in that case, and in the judgment he is about to deliver—which he has kindly afforded me the opportunity of reading, and which I have most attentively considered—are very cogent and plausible, yet I have been unable to arrive at the same conclusion that he has. I think the history and phraseology of the Act shews it was passed for the protection and benefit of the insured, and “as against the insurer;” that the insured may insure without conditions if he pleases, except those conditions which the law implies; but that in such a case, as against the insurer, the insured may claim the benefit of these conditions. But if the insurer wishes to avail himself of the statute and the statutory conditions, he must pursue the course pointed out by the statute; he cannot, in my opinion, disregard the requirements of the statute, and at the same time claim its benefits; and if he desires other conditions than the statutory conditions, he can only have them by varying the statutory conditions, or add to them in the manner pointed out by the statute. I can add nothing to what Chief Justice Moss and Judge Burton have said in their judgments on this point.

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It is urged that the provisions of this statute do not apply to an insurance by what is called an interim receipt. When that contains an *agreement to insure*, it is, in my opinion, a policy within the meaning of the Act. A policy of insurance is a written instrument containing the contract. Whether it be contained in what is usually called an interim receipt, or a more formal document, it is equally the instrument containing the contract, and so the statutory definition of the term policy, in 33 and 34 Vict. c. 97, Imp., is: "Every writing whereby any contract of insurance is made, or agreed to be made, is evidence."

As at present advised, I think the interim receipt should be treated as the policy. It would be an entire evasion of the statute if companies could insure by a document not in the usual form of a policy, and by calling it by another name impose their own conditions and escape from the provisions of the statute for the protection of the insured; but it is not necessary to discuss or finally decide this point, as in this case of *Parsons v. The Queen Insurance Company*, both the Court of first instance and the Court of Appeal treated the case in the way most favourable for the defendants, and they have nothing to complain of.

As to the contention that the statute of Ontario can only apply to local companies and not to foreign companies, or companies incorporated by the Dominion of Canada, in my opinion any company, whether foreign, or incorporated by the Dominion Legislature to carry on the business of fire insurance in any part of the Dominion of Canada, must do so subject always to the laws of the Province in which the business is done, in the same way that a merchant carries on his trade or commerce within a Province; but because he is a merchant or trader he is not exempt from an obligation to obey the laws of the Province in which he carries on his business, if he enters into a contract within the Province, and the law of the Province prescribes the form of the contract under its power to legislate as to property and civil rights; neither corporations nor traders can set themselves above that law and contract as they please independent of it. Suppose no statute of frauds was in force in a Province, and the Legislature enacted that no agreement for the sale of goods over \$20 should be valid unless the contract of sale was evidenced by a writing signed by the parties, or in fact enacted a statute of frauds similar to the statute of Charles; or with reference to the statute of limitations, passed an Act limiting the validity of the contract as well as the remedy, or altered

the existing limitations, and reduced or extended the time limited for bringing an action, could a corporation, merchants or traders, successfully claim to be exempt from the operation of such laws on the ground that they interfered with trade and commerce, or that they were foreign corporations or foreigners engaged in trade, and therefore bound by no local laws?

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If an Insurance Company is a trader, and the business it carries on is commercial, why should the Local Legislature, having legislative power over property and civil rights, and matters of a private and local character, not be enabled to say to such a company: "If you do business in the Province of Ontario, and insure property situate here, we have legislative control over property and over the civil rights in the Province, and will, under such power, for the protection of that property and the rights of the insured, define the conditions on which you shall deal with such property," it being possibly wholly unconnected with trade and commerce, as a private dwelling or farming establishment, and the person insured having possibly no connection with trade or commerce?

How can it be said that such property and such civil rights or contract shall be outside of all local legislation, and so outside of all local legislative protection? If the business of insurance is connected with trade and commerce, the legislation we are now considering does not attempt to prohibit the carrying on of the business of insurance, but having the property and the civil rights of the people of the Province confided to them, this legislation, in relation thereto, is simply the protection of such property and of such rights. In *Pattison v. Mills* (1), Lord Lyndhurst says:

"And here another question arises: supposing the Act does not extend to Scotland, still it is said to be a bar to this action, because it is founded on a policy by an English company. The company is certainly an English one, but it is to be considered where the original contract was made. The policy was executed in London, but the action is not on the policy, but on the agreement; the original contract is made in Scotland; and if I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them."

In *Copin v. Adamson* (2), Kelly, C. B., cites the marginal note in *Bank of Australasia v. Harding* (3), which he adopts as a correct proposition of law:

(1) 1 Dow & C. 362. (2) L. R. 9 Ex. 345, 350. (3) 9 C. B. 661.



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"The members resident in England, of a company formed for the purpose of carrying on business in a place out of England, are bound, in respect of the transactions of that company, by the law of the country in which the business is carried on."

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I am, therefore, of opinion that this Act applies to all Insurance Companies that insure property in the Province of Ontario, whether local, Dominion or foreign.

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STRONG, J. :—

Who was present at the argument in the cases of *The Queen Insurance Company v. Parsons*, and *Citizens Insurance Company v. Parsons*, did not deliver a formal judgment, but authorized the Chief Justice to state that he entirely agreed with the majority of the court in their conclusions, both as to the constitutionality of the Ontario statute, c. 162 R. S. O., and the construction to be put upon the provisions of that statute.

[Translated.\*]

FOURNIER, J. :—

The principal question to be decided is whether the Ontario Act, 39 Vict. c. 24, now c. 162 of the Revised Statutes of Ontario, to secure uniform conditions in policies of fire insurance, is constitutional. Its constitutionality is questioned on the ground that the power of legislating in reference to the subject-matter of insurance belongs to the Federal Parliament, as the necessary sequence of its exclusive power to regulate trade and commerce.

In order to ascertain whether there is a conflict of powers, the first step, no doubt, is to examine the character of the law in question. As may be seen from its title, the object of the Act is to secure uniform conditions in policies of fire insurance.

The second section enacts that the imperfect fulfilment of the conditions of the policy, with respect to the proof of the fire, shall not be a sufficient ground for avoiding the contract—first, where, by reason of necessity, accident or mistake, the conditions have not been complied with; secondly, where, after proof of loss has been given in accordance with the conditions of the contract, the company objects to the loss upon other grounds than imperfect compliance with such conditions; thirdly, where, after having received this proof, the company does not give notice in writing to the

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\* [In the authorized reports this judgment is published in French with an English translation. The above is a revision of that translation by the present editor.]

assured, within a reasonable time, of the ground on which the company considers the proof defective; fourthly, when the court or judge for any other reason considers it inequitable that the insurance should be deemed void by reason of imperfect compliance with such conditions. The third section declares that the conditions set forth in the schedule to the Act shall, *as against the insurers*, be deemed to be part of every policy of fire insurance, with respect to any property situate in the Province of Ontario. These conditions must also be printed on the policy of insurance, with the heading "Statutory Conditions." The fourth section indicates the manner in which the conditions may be varied or omitted, or new conditions added, and the mode of printing them. The fifth section declares that the variations shall not be binding on the assured unless they have been made in conformity with the fourth section; otherwise the policy shall, *as against the assurers*, be subject to the statutory conditions only. By the sixth section, it is declared that if any other conditions than the statutory conditions are inserted in the policy, and such conditions are held by the court or judge to be not just and reasonable, such conditions shall be null and void. The seventh section allows an appeal from any decision given under the Act.

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This synopsis of the law shews that it is limited to establishing rules respecting the proof to be given in certain cases, and to declare what shall be in the Province of Ontario the binding conditions of all contracts of insurance. These provisions, entirely relating to civil law, do not in any way prohibit the business of the assurers, neither do they declare that the policies which they issue are void. They are just and reasonable conditions, and, in fact, are almost similar to the conditions adopted by the majority of Insurance Companies. How then can it be said that this legislation in anywise trenches on the power of regulating trade and commerce? The subject-matter to which it is applicable is the contract of insurance, and does not that belong to the civil law, and does it not come under the jurisdiction assigned to the Provinces by paragraph 13 of section 92 of the B. N. A. Act, "Property and Civil Rights?"

No doubt the contract of insurance is extensively employed in commerce as well as by non-traders. But the object of a contract does not change its character; whatever may be its object, the contract of insurance is never anything but a contract of indemnity, which is similar to a contract of guarantee, and, as such, belongs to the civil law. In commerce, contracts of sale, of exchange and

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hiring are constantly employed and executed. Does it then follow that any legislation in reference thereto must be considered as being a regulation of commerce? If this be so—if everything which has reference to commerce ought for this reason to come under the exclusive control of the Federal power, the greater portion of the powers of the Provinces would thus become of no avail, for commerce in its most comprehensive meaning extends to everything. It is, as defined by a French author, "Cet échange de produits et de service. C'est en dernière analyse le fonds même de la société."

It is evident that this word cannot have in our Constitutional Act such an extensive meaning.

In order to determine the scope of the second paragraph of section 91, it should not be read alone, but, on the contrary, it should be taken in connection with the whole of the provisions of the Constitutional Act, in order to arrive at a conclusion conformable to the spirit of the Act and to give effect to all its provisions. The aim of the law-giver in dividing the legislative powers by sections 91 and 92 between the Federal power and the Provincial Legislatures, was, as far as was consistent with the new order of things, to conserve to the latter their autonomy in so far as the civil rights peculiar to each Province were concerned. We would, however, arrive at a very different result if we gave to paragraph 2 the extended meaning that might be given to it if taken literally. But it is evident that this would not be interpreting it correctly, as the following paragraphs of the same section give it a limited meaning. If it had been the intention to give to this expression, "Regulation of trade and commerce," such an absolute meaning, why should certain subjects of legislation which certainly come under the power of regulating trade and commerce have been enumerated in the statute, such as, for example, navigation, shipping, banks, bills of exchange, promissory notes, insolvency and bankruptcy—all subjects which, without this special enumeration, would be comprised within the power of regulating trade and commerce? The proper conclusion to draw, it seems to me, is that if the general expressions in these paragraphs do not comprise, according to the Act itself, all that certainly forms part of commerce, still less should they comprise a subject-matter which is only indirectly connected with commerce.

In the case of *Severn v. The Queen* (1), I relied on the definition

given by Marshall, C. J., of the words "to regulate commerce," in the Constitution of the United States. It is as follows: "It is the power to regulate, that is to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." I still adhere to the correctness of this definition. If we take it in its entirety, it is applicable to the question now under consideration, and will help us to solve it. We must, above all, not lose sight of the last words, "and acknowledges no limitations other than are prescribed in the constitution." This restriction indicates that it is in the constitution alone that the limitations of the power to regulate commerce are to be found. After giving this power to the Federal Parliament by paragraph 2, section 91, the statute gives to the Provinces legislative control over property, civil rights, and matters of a merely local and private nature, etc. These special powers, exclusively assigned to the Provinces, cannot by the very terms of the constitution be considered as coming under the power of regulating commerce. Regulation of trade and commerce must necessarily mean something else than legislation on property and civil rights, subjects which belong exclusively to the Local Legislature. In exercising its power, the Federal Parliament, no doubt, has the right to deal incidentally with matters which are under the jurisdiction of the Provinces, but this power does not extend any further than is reasonable and necessary in order to legislate for commercial purposes only. The Federal Parliament could not, therefore, under the pretence of legislating on commerce, entirely control a subject-matter which comes under the jurisdiction of the Provinces. Its power to legislate for the regulation of commerce must be complete, without however destroying the jurisdiction of the Provinces over that part of the subject-matter which is not affected by such legislation.

If this was not the case, whenever the Federal power, in exercise of its authority over commerce, should indirectly affect property and civil rights, it would follow that all legislation over the subject-matter would belong exclusively to the Federal Parliament, and the legislative power of the Provinces over the same matter would cease to exist. The decision of the Privy Council in the case of *L'Union St. Jacques v. Belisle* (1) has enunciated a principle which,

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(1) L. R. 6 P. C. 31; *ante*, p. 63.

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applied to this case, enables us to reconcile the exercise of the respective powers of the Federal and Provincial Governments. If this construction is not the proper one, what would be the consequence of legislation on the subject of marriage? The Federal Government has jurisdiction over marriage and divorce; the jurisdiction of the Provinces is limited to the solemnization of marriage, that is to the outward formalities of the marriage contract. Now, the general expression "marriage and divorce," literally interpreted, is susceptible of a very extensive meaning. Could the Federal Parliament, in this case, on the ground that the legislation over marriage is assigned to it, extend its jurisdiction so as to regulate the civil conditions of the contract, such as dower, community of goods, etc., and thus exclude the jurisdiction of the Provinces over that portion of the civil law? On the contrary, is it not evident that the Federal Parliament should confine its legislation strictly to the conditions which have reference to the capacity or incapacity of contracting marriage, and to reasons for prohibition, and to other conditions relating to the character of that contract, without interfering with the civil rights appertaining thereto? This general expression, in paragraph 26, section 91, "Marriage and Divorce," gives us another example of the use made in the Constitutional Act of expressions which must have a meaning limited by the other provisions of the same Act. Cannot the same process of reasoning apply in construing the power of regulating trade and commerce?

In order to reconcile the exercise of these powers, I have arrived at the conclusion, in a case such as the one now under consideration, that the Provincial jurisdiction is only limited by the exercise by the Federal Parliament of its power, in so far as the latter is competent to exercise it—and that the Province can still exercise its power over that portion of the subject-matter over which it has jurisdiction, wherever this would not directly conflict with Federal legislation on a matter within Federal jurisdiction—this interpretation seems to be supported by the following authority: "A grant of a power to regulate necessarily excludes the action of all others who would perform the same operation on the same thing" (1). The question, therefore, is, is there any Federal legislation on the same subject—"same operation on the same thing"? It is quite true that the Parliament of Canada has passed several statutes relat-

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(1) Story, on the Constitution, s. 1067.

ing to Insurance Companies, prior and subsequent to the law now under consideration. Without wishing to enter into a minute examination of this legislation, upon which I am not at present called on to decide, I think, however, that I should refer to some of its principal provisions, in order to shew that there is no conflict between the Federal laws and the law of Ontario.

The statute 40 Vict. c. 42, which amends, consolidates and repeals the previous Acts, of which the first is 31 Vict. c. 48, passed by the Federal Parliament, in reference to the subject-matter of insurance, enacts provisions, the object of which is clearly to protect the public against loss which might result from companies being irresponsible. The companies to which this Act applies are first obliged to take out a license, without which they cannot transact any business; they must afterwards deposit in the hands of the Minister of Finance the sum of \$100,000 as security for the holders of their policies of insurance. They must also file in the Department of Finance, as well as in the offices of the Superior Courts having jurisdiction where they transact business, a copy of their charter of incorporation, and a power of attorney, in the form prescribed, on the part of the company, to its principal manager or agent in Canada, with a declaration that the service of any writ or proceeding against the company can be made at the office of such agent. They must furnish complete and detailed statistics of their business, and notify any change with respect to their head office, give notice when they have obtained a license, and also when they cease to do business. Special provisions are enacted for winding up in case of insolvency. Lastly, they are subject to the inspection and supervision of an inspector, who is clothed with wide powers for the enforcement of the provisions of the Act.

These provisions, it is clear, are not intended to regulate the contract of insurance, but are only for the purpose of subjecting the insurer, in the exercise of his trade as such, to certain regulations established for the protection of the public. This legislation does not impose any conditions which necessarily form part of the contract.

The Federal law therefore does not in anywise affect the nature of the contract of insurance, nor the conditions which are to form part of such contract, with which the law of Ontario deals exclusively—both deriving their respective powers from different sources, the first from the power of regulating trade and commerce, and the other from the power of legislating as to civil rights and pro-

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party. Why, if the provisions of these laws are neither conflicting nor antagonistic, cannot both stand? I must confess that I see between them no conflict, and I see no obstacle to their being carried into operation. This view of the case is supported by the following authority (1):—

“So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shews that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.”

Although it is possible to thus reconcile these two enactments, is it not evident, however, that the Act passed by the Legislature of Ontario, relating exclusively to the proof to be made in case of loss, and to the nature of the conditions of contracts of insurance effected in the Province of Ontario, is *intra vires*? for the issuing of a policy of insurance is not necessarily a commercial transaction. It is certainly not one on the part of the assured, although by the Civil Code, it is a commercial transaction on the part of the assurer. Pardessus, *Droit Commercial*, says:

“Elles (les conventions d'assurance) ne sont par leur nature des actes de commerce au moins de la part de ceux qui se font assurer. Mais comme presque toujours de la part de ceux qui assurent, elles sont de véritables spéculations, c'est sous ce point de vue que nous les considérons comme actes de commerce et que nous avons cru devoir en faire connaître les principes.”

It is the same in English law; insurance is a commercial transaction, although the contract of insurance which is constantly employed forms part of the civil law. In our Constitutional Act I cannot find anywhere that commercial law is under the jurisdiction of the Dominion; it seems to me, on the contrary, that the Act, by assigning specifically to the Dominion legislative control over a part of the commercial law, such as any law on navi-

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(1) Pomeroy on Constitutional Law, p. 218.

gation, banking, bills of exchange, promissory notes, and insolvency, has left the residue to the jurisdiction of the several Provinces as coming under the head "Civil Rights." In this view of the case, the Act now under consideration would derive its authority from the power of the Provinces to legislate on civil rights. It is on this principle that the case of *Paul v. Virginia* (1) was decided. A law passed by the State of Virginia enacted that insurance companies, not having been incorporated under the laws of the State, could not transact any business within the limits of the State without previously taking out a license and depositing a certain sum as security for the rights of the assured. The Plaintiff contended that the law was unconstitutional, because it was contrary to the power of Congress to regulate trade and commerce. Mr. Justice Field, who delivered the judgment of the court, makes use of the following language :—

"Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporation and the assured for a consideration paid by the latter."

According to this decision, the Legislature of Ontario had power to pass the law in question, as being a part of civil law.

But there is also another argument which I consider very important in the present case ; it is, as will be seen hereafter, the recognition by the Federal Parliament of the right of the Local Legislatures to legislate on this subject. Although, by paragraph 11 of section 92, power is given to the Provinces to incorporate companies for *Provincial objects*, it has been contended that these words are not sufficient to comprise the power to incorporate Insurance Companies. It seems to me, however, that the terms are sufficiently comprehensive to include Insurance Companies. If it is objected that the object of an Insurance Company is not *Provincial* in the sense that it has not for its object an interest which concerns the whole Province, that is to say, a public interest, I answer by saying that the object of the company being to transact business throughout the Province, this is the meaning of the term Provincial objects, if it has any meaning. It certainly has no meaning whatever, if it is to be interpreted as giving the power only of incorporating companies having a public Provincial interest. Such an interpretation would be equivalent to saying that the Gov-

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ernment could delegate its functions to corporations, and have them exercised by them, and that they have no power to incorporate companies for the purpose of commerce, industry, trade, etc., etc. They certainly have, in my opinion, that power, provided the companies thus incorporated confine their operations within the limits of the Province. If they desire to go outside of the Province, they come under the provisions of the Federal law, to which they must conform, and which contains special provisions for this case.

This power of incorporating companies, exercised by the Legislature of Ontario, has been recognized by Federal legislation, as belonging to Provincial Legislatures. Sec. 28 of 40 Vict. c. 42, enacts :

"This Act shall not apply to any company within the exclusive legislative control of any one of the Provinces of Canada, unless such company so desires, and it shall be lawful for any such company to avail itself of the provisions of this Act, and, if it do so avail itself, such company shall then have the power of transacting its business of insurance throughout Canada."

The first section of this Act makes the laws respecting insolvency applicable to insurance companies incorporated by the Parliament of Canada, as well as to those incorporated prior to and after Confederation, by the Legislature of any Province now constituting Canada. We also find in the 30th section of the same Act another recognition of the power of the Provinces to legislate on the subject of insurance. Doubts having been raised as to the validity of a certain Ontario statute relating to mutual insurance companies, this section of the Federal Act declares that only such provisions as are within the jurisdiction of the Federal Parliament are repealed. In this section there is not only the formal recognition of this power in the Province, but there is also this important declaration, that the Act is not repealed except as to that part of its provisions involving a conflict of power. It is a formal admission that this subject-matter, when treated in its commercial aspect, is within the control of the Federal Parliament, whilst, when regarded as relating to civil rights, such as involve the nature and conditions of the contract of insurance, it remains under the control of the Provincial Legislature. This also confirms the opinion above stated, as to the restrictions which the Federal and Provincial Governments must impose upon themselves in the exercise of their respective powers, in order to keep within the limits of their jurisdiction. It is true that the exercise of a power would not

be a sufficient reason, in many cases, for declaring that it legally exists, but in a case such as the one now under consideration, where there are cogent reasons for exercising it in a limited manner, as has been done by 40 Vict. ch. 42, while recognizing the power of the Provinces, which seems equally well founded, we may fairly presume that the agreement of both Legislatures to keep within the limit of their respective powers, affords a strong presumption that they have only exercised such powers as properly belonged to them. The most important public departments, such as the Department of Justice, and the Department of Finance, have for some years past adopted this view of the law, when enforcing the requirements of the different Federal laws relating to insurance. Such an interpretation could not prevail, no doubt, against a judicial decision, but, in the absence of the latter, the interpretation given by the departments must have great weight. Story assigns to it the second place, and speaks of it as follows :

"And, after all, the most unexceptionable source of collateral interpretation is from the practical exposition of the Government itself in its various departments upon particular questions discussed and settled upon their own single merits. These approach the nearest in their own nature to judicial expositions ; and have the same general recommendation that belongs to the latter." (1)

This departmental interpretation has been acted upon for several years—the license fees have been collected, the required statistics have been furnished without any adverse contention on the part of the Provinces, and the power exercised in virtue of the law of Ontario was not contested by the Federal Government, which might have disallowed the Act had they considered it *ultra vires*. When both Governments are in accord, and by their enactments dispel any doubts which might exist, would it not be rash to substitute another interpretation for theirs ? If there is any doubt on the matter, it seems to me to have been settled by legislative interpretation, and all the tribunals have to do is to conform themselves thereto. Thus, besides the reasons I have given above in support of the law of Ontario, there is also to support it administrative and legislative interpretation. If I do not add judicial interpretation of the Ontario Courts, it is because that interpretation is questioned in the present appeal ; but it is, nevertheless, of the greatest weight, as it has been the unanimous opinion of all the judges who have been called upon

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(1) Story, on the Constitution, Vol. I., sec. 408.

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to pronounce upon this question. In addition to this, we have this decision supported by the Supreme Court of the United States in the case of *Paul v. Virginia*. Besides the question raised as to the constitutionality of the Act, the company (Appellant) contends that, because it has been incorporated by the Parliament of Great Britain, it is not subject to the provisions of the Act now under consideration. Whatever may be the origin of corporations, whether they owe their existence to the Parliament of the Dominion or to the Provincial Legislatures, or to a foreign power, they are nevertheless, in the one case as the other, subject, in order to exercise their powers, to the conditions which may be imposed upon them by the laws of the country where they exercise such powers. These corporations are in reality commercial associations, which only differ from ordinary commercial partnerships as to the limited liability of the members thereof. The Federal statute which I have cited, by the first section, treats them as ordinary associations of individuals transacting insurance business. These corporations cannot, any more than other associations, set themselves above the law, to which they are obliged to conform. Our large commercial houses, which have branch houses in the different Provinces of the Dominion as well as in foreign countries, have never for a moment pretended that they could make the laws of the countries in which they carry on business, give way to the terms imposed at their principal place of business. Whatever may be the inconvenience, are they not obliged in all their contracts to conform themselves to the laws of the country where they carry on business? It would, no doubt, be much simpler and more advantageous for insurance companies to have the power of determining themselves their conditions, and to impose them in all countries where they might open offices. Would this not be putting them above the law? Far from recognizing that they have such privileges, numerous authorities and judicial decisions agree to the contrary. This point has already been decided in the case of *Paul v. Virginia*, already cited, in which Mr. Justice Field says :

“ A recognition of its (corporation) existence even by the other States, and the enforcement of its contracts made therein, depend greatly on the comity of those States, a comity which is never extended when the existence of the corporation or the exercise of its power is prejudicial to their interests or repugnant to their policy. They may exclude the foreign corporation, they may restrict its business to particular localities, or they may exact security for the

performance of its contracts with their citizens, as in their judgment will best promote the public interest."

It is hardly necessary to cite authorities on this point, as it is only the application of the elementary rule, "*locus regit actum*." I will cite, however, the following, as it contains the opinion of the author of the "*Traité du Droit de la Nature et des Gens* :"

"Lorsque la police est applicable à des navires armés et équipés en France quoique étrangers les dispositions de la loi française doivent être suivies. La cour de Cassation a eu occasion d'examiner cette question et l'a résolue dans ce sens. Merlin qui rapporte cet arrêt l'approuve." (1)

"'Sur cette question,' disait Mr. Daniels, organe du ministère public, 'rien n'est plus constant que le principe invoqué par les demandeurs et développé par Puffendorf : Quiconque passe un contrat dans les terres d'un souverain, se soumet au loi du pays et devient en quelque manière, sujet passager de cet état.'"

For these reasons I am of opinion that these appeals should be dismissed with costs.

HENRY, J. :—

Several important questions were raised and argued in this case, not the least of which was that as to the constitutionality of the Act of Ontario, which provides for conditions in policies for fire insurance such as that which is now contested by the Appellants. I have considered that subject, and have arrived at the conclusion that the Act is *intra vires*. It is contended that, inasmuch as "the regulation of trade and commerce," by the 91st section of the B. N. A. Act, is specifically given to the Parliament of Canada, there is no power in a Local Legislature to regulate by enactment the rights of insurers and those they insure against loss or damage by fire. It is also contended that, if it be not so, the Local Legislature might, by the imposition of conditions and restrictions, frustrate the object of a company chartered, or incorporated by, or under, an Imperial Act, as is the case with the Appellant's company, or by or under an Act of the Parliament of Canada. The contention may or may not be well founded, but local legislation has not yet reached that point, and besides, the settlement either way cannot, I think, affect the main question. If it ever does, it

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will be time enough to deal with that position when it arises. If the power to regulate the matters in question be with the Local Legislature, it is not easy to find the authority to question, control, or limit the exercise of it.

We must construe the words of sec. 91, which I have quoted, by the whole Act, and the several important objects in view, and be governed by what is intended by it. The regulation of trade and commerce is a very comprehensive, but, at the same time, a very indefinite and vague term, and, if construed in its comprehensive meaning, would include a great variety of subjects which we find specifically added in the list of subjects given to the Parliament of Canada, such, for example, as "Beacons, Buoys, Lighthouses," "Navigation and Shipping," "Quarantine and the establishment of Marine Hospitals," "Currency and Coinage," "Banking, incorporation of Banks, and the issue of Paper Money," "Bills of Exchange and Promissory Notes," "Interest," "Legal tender," "Bankruptcy and Insolvency," and others. From this it may be fairly assumed the term was used in some generic, but, at the same time, qualified sense, and not intended to apply to the regulation of trade and commerce in regard to all subjects that may be found to contribute to the one or the other. The operations of manufacturers, the hiring of their operatives, the providing and erection of machinery, procuring the raw materials used by them, with the necessary contracts and agreements and expenditure of labour employed, and the interests of all parties engaged, from the owner of the soil through all the train of persons engaged in producing and supplying lumber, iron or other materials for manufacturing purposes, may all be said to be intimately connected with trade and commerce, and be included in the general term used, and if they were not shewn by the whole Act and its objects to be excepted, we might possibly conclude them to have been intentionally included. The matters just referred to all tend to contribute to and create trade and commerce; but a Fire Insurance Company may operate, as they do in some cases, only in respect of agricultural buildings, which but very remotely have any effect on the trade and commerce of the country. If organized for local operation, we find, by number 11 of the list of subjects given to the Local Legislatures, the charters are to be granted by them. "The incorporation of companies with Provincial objects" are the words used. But apart from these considerations, "property and civil rights in the Province" being within the power of the Local Legislatures,

we must determine the extent to which, if any, the power to deal with them is necessarily restrained, and what limitation of them the British Parliament intended to provide in reference to the exercise of it, by giving to Parliament "the regulation of trade and commerce."

As I have before said, we must construe the whole Act together, and so as to give effect, if possible, to every part of it, and reconcile and ascertain what seeming contradictions the British Act contains.

From the peculiar distribution of the legislative powers, and the mode adopted, it was a difficult undertaking to legislate so as to prevent difficulties arising, but they are to be properly resolved only by keeping prominently in view the leading objects intended to be provided for. Looking only at number 26 in the list contained in section 91, and finding the words "Marriage and Divorce," we would at once conclude that those words included everything with respect to those subjects; but in number 12 of section 92 we find "The solemnization of marriage in the Province" is expressly given to the Local Legislatures. No doubt can be entertained that, considering both provisions, notwithstanding any other provision of the Act, the intention was to give the power to regulate the solemnization of marriage to the Local Legislatures. I admit that the two cases are not exactly alike, but still it shews no one part of the Act should be alone looked at.

The incorporation of Fire Insurance Companies with Provincial objects being given to the Local Legislatures, they can, as to them, prescribe conditions and terms for the conduct of the business, and regulate the rights of the companies and those dealing with them. With the power to deal with the whole subject of property, real and personal, and civil rights, and the right to prescribe and regulate as just stated, in respect of the incorporation of companies with Provincial objects, it would be unreasonable to conclude they were intended to have no power to apply the same, or similar conditions, to the dealings of other companies chartered outside. It would be, I think, improper to conclude that the Imperial Parliament, in the use of the words "the regulation of trade and commerce," in the peculiar connection in which we find them, could have intended them to apply, not only to the regulation of trade and commerce, as generally understood, but to all trading and commercial contracts, so as to limit the operation of the provision giving specifically the subject of property and civil rights to the Local Legislatures.

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If once decided that contracts for fire insurance are necessarily beyond the powers of the Local Legislatures, where can a line be drawn to save to them the power to legislate touching the wages and contracts connected with manufactories, mercantile transactions, or others, or in respect to liens on personal estate, in the shape of stocks of goods, or to mercantile shops or warehouses?

The words of a statute, unless the context shews otherwise, or they have a technical meaning, are to be construed according to their well-understood and accustomed meaning. "Trade" means the act or business of exchanging commodities by barter, or the business of buying and selling for money—commerce—traffic—barter; it means the giving of one article for another for money or money's worth. "Commerce" is only another term for the same thing. Neither of the terms includes the rules of law by which parties engaged in trade or commerce are bound to each other; but when their *regulation* is given to a legislative body, it must be assumed the intention was that control in some respects was to be exercised, but to what extent, we must judge in this case by taking the whole Act into consideration. I have no doubt that the Dominion Parliament has power to enact general regulations in regard to trade and commerce, but not to interfere with the powers of the Local Legislatures in the matter of local contracts, amongst which is properly included policies of insurance against loss by fire on property in the same Province.

"To regulate" trade may remotely affect some of the conditions and terms under which articles are produced, but not necessarily so; and the regulation of it may consist only in rules governing the disposition or sale of goods, or may include conditions under which goods are manufactured, by which they become liable to duty. The term or expression "Regulation of trade and commerce" cannot, under the Imperial Act, be construed to extend to and include contracts for the erection, purchase, or renting of warehouses, manufactories, or shops used for trading or commercial purposes.

In some of the cases I have put, trade and commerce would be regulated. In the others they might be affected, but only incidentally, by the laws regulating contracts; nor is it, I think, at all necessary under the Act that they should be construed to regulate contracts. This view is in accordance with the decision of the Supreme Court of the United States, in *Paul v. Virginia* (1), cited

in this case by the learned Chief Justice of Ontario, and which, in the absence of English authorities, I feel at liberty to adopt.

I was of the majority of this court who decided against the constitutionality of the Act of Ontario under which the case of *Severn* and *The Queen* came before us ; but that case was essentially different from this, as will appear by a comparison of my reasons in the two cases.

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Since this judgment was prepared in December last, I heard very attentively the argument of other cases on the constitutionality of two Acts—one of the Dominion Parliament ; the other of the Act under consideration in this case—but have heard nothing to induce me to change my views, but, on the contrary, much to sustain them.

Since judgments were delivered in *The Queen v. the City of Fredericton* (1), I lighted upon a judgment of the Privy Council which sustains the views I therein enunciated, as well as those in my present judgment.

In *Ingram v. Drinkwater* (2), it was held, as by the head note, that although the words of the statute—

“ Were large enough to include a rent-charge in lieu of tithes, they would not necessarily do so if it appeared from the general wording of the Act that it was not intended to apply to incorporeal rights.”

The doctrine, as laid down by the court, is thus stated :—

“ It is clear that, under the 6th section of the Act of 1860, the rate can only be laid on property legally liable to be included in the valuation under the 2nd section, and the only words in that section, or throughout the Act, which the Respondent relies upon to make the amount paid to the vicar ratable, are the words ‘ real estate,’ which, doubtless, are large enough to comprehend it, if intended to do so, but which have not necessarily that effect unless so intended ; and looking to the collocation of those words in the different sections, as well as to the whole frame and general wording of the Act, their Lordships are of opinion that the rating powers were not intended to include or apply to the amounts payable to the Appellant, and others similarly circumstanced.”

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(1) 3 Can. S. C. R. 505.

(2) 32 L. T. N. S. 746.



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This is an action on a policy of insurance made after the passing of the Act of the Legislature of Ontario, 39 Vict. c. 24, and the policy did not contain the conditions as required by that Act.

The same questions are raised here as in the case of the *Queen Insurance Company v. Parsons*, decided this term: first, as to the constitutionality of the Act; and, secondly, as to the consequence of a company ignoring the Act, and inserting conditions different from those prescribed by it. I have given, in my judgment in that case, my views on both subjects, and, in accordance with those views, I have now only to say that, in my opinion, the Act in question was not *ultra vires*, and that, as the Appellants inserted conditions in the policy contrary to its provisions, they cannot set them up as any answer to the Respondent's action.

. . . . .

The Appellants contend that, as their company was incorporated by the Dominion Parliament, they cannot be reached or affected by a local Act. That contention has been well answered in the judgments appealed from. If, as I have considered, the Local Legislature had the right to regulate fire insurance contracts, in common with others, it matters little where the mere corporate existence is created. By the comity of nations and countries, companies chartered in one country are acknowledged in others, but, at the same time, foreign companies must carry on their affairs and business, and be guided and governed by the local laws of all countries in which such affairs and business are carried on.

The issues tendered by the only pleas brought to our notice become, for the reasons given, immaterial, and are therefore no answer to the action of the Respondent. Those pleas are founded, according to my views, on illegal conditions in the policy, and the breach of them cannot, therefore, be alleged as a ground of defence.

I think the appeal should be dismissed, and the previous judgments affirmed, with costs.

TASCHEREAU, J. :—

I do not concur in the judgment of the court in these cases, and I proceed to state the grounds upon which I dissent.

The Citizens Insurance Company of Canada, known in the first instance under an Act of the late Province of Canada, 19 and 20 Vict. c. 124 (1856), as the Canada Marine Insurance Company,

later under 27 and 28 Vict. c. 98 (1864), as the Citizens Insurance and Investment Company, and now, under its present name, by an Act of the Dominion Parliament, 39 Vict. c. 55 (1876), has obtained from the Federal authority, by this last statute, the right to make and effect contracts of insurance upon such conditions, and under such modifications and restrictions, as might be bargained or agreed upon by and between the company and the persons contracting with them for such insurances.

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By chapter 162 of its revised statutes, the Ontario Legislature has virtually revoked this power which this company held from the Federal authority, and repealed the enactment of the Dominion Act under which the said company held this power, for a law repugnant to another, as entirely repeals that other as if express terms of repeal were used. It has said to this company: "The Federal authority has given you the right to make such contracts as you pleased, but we revoke that grant; we repeal *pro tanto* the Dominion statute under which you held it, and hereafter you shall not contract except under the conditions we impose upon you."

Had the Ontario Legislature, under the B. N. A. Act, the power to do so? or, to put the question in another shape, Had the Dominion Parliament the right to pass the 39 Vict. c. 55, under which the company (Appellant) claim the right to issue their policies under such conditions as they please? For it must be admitted that, under the B. N. A. Act, there can be no concurrent jurisdiction in the matter between the Federal and the local legislative authorities, and that if the Dominion Parliament had the power so to authorize the said company to issue its policies under such conditions as it pleased, and to enact the said 39 Vict. c. 55, the Local Legislature had not the power to revoke this authorization or to repeal the said Act. It would be a strange state of things indeed if the Local Legislatures could repeal an Act passed by the Dominion Parliament. They cannot do so either expressly or impliedly. They cannot by their legislation render nugatory the enactments of the Federal legislative power on subjects left under the control of the said Federal legislative power by the B. N. A. Act.

Are these statutes, the Federal Act creating the company (Appellant) and the Ontario Act imposing conditions on its policies of insurance, regulations of trade and commerce? If they are, it follows that the Federal Act is constitutional and the Ontario Act unconstitutional. I am of opinion that both of these statutes are

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regulations on commercial corporations and commercial operators, and the words "regulation of trade and commerce" in sec. 91 of the B. N. A. Act, mean "all regulations on all the branches of trade and commerce." Indeed, a contrary interpretation would be against the very letter of the Act. We cannot, it seems to me find restrictions and limitations where the words used by the law-giver are so clear and general. That companies doing the business of insurance are commercial companies, and that their operations are of a commercial nature, admits of no doubt in my opinion. In one of the Provinces (Quebec) a special article of its Civil Code (2470) distinctly says so, and in that same Province, so far back as 1835, long before the Civil Code, the Court of Queen's Bench in Montreal, composed of Vallière, Rolland and Day, JJ., in a case of *Smith v. Irvine* (1), held that the insuring against fire by an Insurance Company is a commercial transaction.

So it is held to be in France :

" Cette entreprise, supposant l'existence d'un établissement et de bureaux ouverts à quiconque voudra se faire assurer, et un ensemble d'opérations faites dans l'espoir des bénéfices qui doivent en resulter présente tous les caractères d'une spéculation et constitue une véritable entreprise commerciale.

" Les Compagnies d'assurance à prime font évidemment des actes de commerce en souscrivant des polices d'assurance, puisqu'elles font profession de vendre la garantie à laquelle elles s'obligent, et qu'elles ne contractent qu'en vue de profit qu'elles espèrent retirer de leurs opérations." (2)

" L'assurance à prime contre l'incendie étant de la même nature que l'assurance maritime est réputée acte de commerce. Dalloz avait d'abord émis un sentiment contraire qu'après nouvel examen il a cru devoir abandonner." (3)

In Prussia, Belgium, Portugal, Spain, Holland and Wurtemberg, whose codes I have been able to refer to, the contract of insurance against fire is also held to be a commercial contract. Why should it be considered otherwise in England, the emporium of trade and

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(1) 1 Rev. Leg. 47.

(2) Boudousquid, *Traité de l'assurance* No. 70.

(3) *Ibid.* No. 384. See Dalloz, *Actes de Commerce*, No. 216, where the decisions cited shew that the jurisprudence of the courts is in the same sense. See also "Pardessus," *Droit Commercial*, No. 588; Dalloz, *Diction. vo. Assurance Terrestre*, Nos. 19, 20 and 22.

commerce, where the amount of business done by these fire companies is so large? Not a single authority has been cited at the Bar tending to shew that there they are not considered as commercial companies, or that their operations are not considered as commercial operations, and I have not been able to find any. On the contrary, if I open Homan's Cyclopædia of Commerce, or MacGregor's Commercial Statistics, or McCulloch's Commercial Dictionary, I find these companies and their contracts treated of as falling under the commercial operations and the commercial law of England. In Stephen's Commentaries (1), an insurer is spoken of as a party "carrying on" a general *trade* or "business of insurance."

In Levis' Manual of Mercantile Law (2), Joint Stock Companies are said to be under the commercial law of England, and at paragraph 230 of the same book I find a chapter on these Insurance Companies as falling within the mercantile law. So in Smith's Mercantile Law, and in Chitty's Commercial and General Lawyer. And Lord Mansfield, in *Carter v. Boehm* (3), says that "Insurance is a contract upon speculation." I also remark that this case was tried before a special jury of *merchants*, yet it was not a case of maritime insurance.

I really cannot see on what grounds, under the English law, a Fire Insurance Company can be said to be a non-commercial corporation. It is commercial, it seems to me, for the same reasons that make it so in France and the rest of Europe, that is to say, because it is a company doing the business of speculation on risks and hazards, because it trades on its contracts of indemnity, because it does the business of selling that indemnity. It is as commercial as the contract of maritime insurance, the character of which admits of no doubt (4), and in which, as in the contract of fire insurance, there is nothing but a contract of indemnity (5). And is not maritime insurance a commercial contract, whether it is a pleasure yacht, a man-of-war, a ship engaged in a scientific expedition, or a merchant vessel that is insured? Then, if so, how can it be contended that fire insurance is a commercial contract only when it is made on goods and merchandize, and not commercial when made, say, on a building? As in maritime insurance it is not from the nature of the thing insured that the transaction derives its character, but from the fact that the insurer does the business, specu-

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(1) Vol. II. p. 127.

(2) Par. 30.

(3) 3 Burr. 1903.

(4) Stephen's Com. Vol. II. p. 128.

(5) Dalby v. India and London Life Assurance Co., 15 C. B. 365.

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lation or trade of insurance ; so, for instance, with the contract of sale, which is not commercial of its essence, but becomes commercial, not from the nature of the article sold, but because the seller does a business of selling that article. What is trade ? Trade is an occupation, employment or business carried on for gain or profit. Now, do these Fire Insurance Companies carry on a business for gain or profit ? To ask the question is to answer it. They are trading corporations, and trading corporations are commercial corporations (1). In the United States, as in England, this seems uncontroverted. In Angell & Ames on Corporations, Insurance Companies are classified among commercial corporations. In Parson's Mercantile Law and Bryant & Stratton's Commercial Law, fire insurance is treated of as forming part of the commercial law. In the Civil Code of Louisiana, the contract of insurance was entirely left out, to form part of the Code of Commerce, which it was then intended to promulgate.

But great stress is laid by the Respondent on the decision of the Supreme Court of the United States in *Paul v. Virginia* (2), where Field, J., said that issuing a policy of insurance is not a transaction of commerce. Well, I may first remark that this case is not binding on this court ; then, a reference to the report shews that this is simply an *obiter dictum* of Mr. Justice Field, and that the gist of the decision in that case is merely, that insurance business done by a New York Company, in the State of Virginia, does not fall within the meaning of the clause of the constitution which declares that Congress shall have power to regulate commerce with foreign nations, and among the several States. Mr. Justice Field himself, in *Pensacola Telegraph Co. v. Western Telegraph Co.* (3), explained what he said in *Paul v. Virginia* as follows :—

“In other words, the court held that the power of Congress to regulate commerce was not affected by the fact that such commerce was carried on by corporations, but that a contract of insurance made by a corporation of one State upon property in another State was not a transaction of inter-State commerce. It would have been outside of the case for the court to have expressed an opinion as to the power of Congress to authorize a foreign corporation to do business in a State upon the assumption that issuing a policy of insurance was a commercial transaction.”

So that this case of *Paul v. Virginia*, it seems to me, has no

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(1) 1 Holmes 30.

(2) 8 Wallace, 168.

(3) 96 U. S. 2.

application whatever here. The relative positions of the Parliament of the Dominion of Canada, and the Legislatures of the various Provinces, are so entirely different from those of Congress and the Legislatures of the several States, that all decisions from the United States Supreme Court, though certainly always entitled to great consideration, must be referred to here with great caution. There, the right to regulate commerce in the State is given to the State, not to the Federal power. Here, as said by Mr. Justice Strong, in *Severn v. The Queen* (1): "That the regulation of trade and commerce in the Provinces, domestic and internal, as well as foreign and external, is, by the B. N. A. Act, exclusively conferred upon the Parliament of the Dominion, calls for no demonstration, for the language of the Act is explicit." I might also remark that, whilst in the United States' constitution the word "commerce" only is used, ours has the words "*trade and commerce*." Some law dictionaries give the word "trade" as meaning "internal commerce," whilst the word "commerce" would refer to foreign intercourse. But this appears to be a fanciful distinction, not recognized either in common parlance or in legal language. In either one or the other the expressions, "the trade with the West Indies, with the United States, . . . the foreign trade," etc., are of every-day use, and therefore, in the interpretation of the Imperial Act, we cannot hold, it seems to me, that the word "trade" has been added to the word "commerce" simply to mean "internal commerce." Leaving it out of the Act, the internal commerce of the Dominion would remain as it is—under the control of the Federal power. Every word of the Act must have its due force and appropriate meaning, and the Imperial Parliament, which, no doubt, whilst creating a Federal union among its North American possessions, had before its eyes the constitution of the United States, must have intended by adding this word "trade" to the word "commerce" to give to our Federal authority supreme power, not only over the commerce, internal as well as external, but also over the trade of the whole Dominion, internal as well as external. Of course we are not called upon to give a general definition of this word "trade," as used in the Act. In the interpretation of the constitution, general definitions are to be avoided. In this case, all that is necessary to determine is, whether the word embraces Insurance Companies and their contracts, and, in my opinion, it does.

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To revert to the case of *Paul v. Virginia*, the *obiter dictum* of Mr. Justice Field, "that issuing a policy of insurance is not a transaction of commerce," seems to me nothing but a truism. In the same sense, as I have remarked before, it may be said that making a contract of sale is not a transaction of commerce. It is the fact of a person or corporation making a business of selling and buying, or of issuing policies of insurance, which gives to the contract of sale, or the contract of insurance, and the seller or insurer, a commercial character. It is in accordance with this principle that the Civil Code of Lower Canada, Art. 2470, to which I have already referred, says that *fire insurances are not by their nature commercial, but that they are so when made for a premium by persons carrying on the business of insurers.*

So it is with the telegraphing business; for example, sending a message by telegraph is not a transaction of commerce, yet telegraph companies inter-States, and the right to regulate them, are held in the United States to be under the Federal power as a part of commerce, and this though a very large proportion of the telegraphic messages have nothing to do with commerce at all (1). With us, on the same principle, telegraph business would also be exclusively under Federal control, if the B. N. A. Act did not expressly vest in the Local Legislatures the control over local and Provincial lines as long as the Federal Parliament does not declare them to be for the general advantage of Canada.

Against the decision of *Paul v. Virginia*, in the United States, a decision in our own courts can be cited. I refer to *Attorney-General v. The Queen Insurance Co.* (2), in which Mr. Justice Torrance, in the Superior Court at Montreal, and the five judges of the Court of Appeal, unanimously held that a license tax on *policies* of insurance was a regulation of trade and commerce, and, as such, under the B. N. A. Act, *ultra vires* of the Provincial Legislatures. This decision seems to me in point. The case was carried to the Privy Council, and the judgment of the Quebec Courts was confirmed without hearing the Respondents. However, the Privy Council disposed of it without deciding whether the Provincial License Act on insurance policies was a matter falling within the words "regulation of trade and commerce" of the B. N. A. Act.

(1) *Western Union Telegraph Co. v. Atlantic and Pacific States Telegraph Co.*, 5 Nev. 102; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1.

(2) 21 L. C. J., 77; 22 L. C. J., 307; *ante*, pp. 131; 153.

It may, nevertheless, be remarked, that their Lordships in their judgment, after saying that the price of a license to a trader is usually ascertained by the amount of his trade, add, referring to the license imposed by the Quebec Legislature on insurance policies, "this is not a payment depending in that sense on the amount of trade previously done by the trader," calling insurance business a "trade" and insurance companies "traders." The report of this case in the *Jurist* is very incomplete. I have referred to the case containing the note of all the judgments in the Quebec Courts at length, as filed before the Privy Council. The judgment of the Privy Council is to be found in 3 App. Cases, 1090 (1).

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I will now refer to the statutes in which the legislative authority of the Dominion has exercised its jurisdiction over insurance companies, or expressed, in its legislation, an opinion on the questions here raised, remarking, at first, that where the commencement of a practice was almost coeval with the constitution, there is great reason to suppose that it was in conformity to the sentiments of those by whom the true intent of the constitution was best known: *Houston v. Moore* (2); *Ogden v. Saunders* (3); *Martin v. Hunter* (4).

Since Confederation, in many instances our statutes have expressly or impliedly recognized insurance companies as trading companies. In the Insolvency Act of 1875 (38 Vict. c. 16, sec. 1), it is enacted that the Act applies to traders and to trading companies, *except insurance companies*. Now, it is an admitted rule of interpretation that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general words, had the exception not been made. So that the opinion of the Federal Parliament must have been, when making the said exception in the said statute, that insurance companies are trading corporations. I see, moreover, that in 32 and 33 Vict. c. 12, sec. 3; 32 and 33 Vict. c. 13, sec. 3; and 40 Vict. c. 43, sec. 3, the Dominion Parliament has enacted that these statutes should apply to any purposes or objects to which the legislative authority of the Parliament of Canada extends, *except insurance*. That is saying clearly that the legislative authority of the said Parliament extends to insurance. Indeed, the Dominion Parliament has given no uncertain sound on the question. Within the very first year of the Confederation (31

(1) *Ante*, p. 117.

(3) 12 Wheaton, 213.

(2) 5 Wheaton, 1.

(4) 1 Wheaton, 304.



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Vict. c. 93), it exercised the power of legislation on the subject, and it has done so ever since, in no less than twenty-five statutes passed thereon at various periods, as follows :—

Sup. C., Canada.	1868,	31	Vict. c. 93.
Taschereau, J.	1869,	32 and 33	Vict. cc. 67, 70.
	1870,	33	Vict. c. 58.
	1871,	34	" " 53, 55, 56.
	1872,	35	" " 98, 99, 102, 104, 105.
	1878,	36	" " 99.
	1874,	37	" " 49, 86, 89, 94, 95.
	1875,	38	" " 81, 83, 84.
	1876,	39	" " 53, 54, 55.
	1879,	42	" " 66.

To these may be added the six License Acts on insurance companies : 31 Vict. c. 48 ; 34 Vict. c. 9 ; 37 Vict. c. 48 ; 38 Vict. c. 20 ; 38 Vict. c. 21 ; 40 Vict. c. 42, in which the Dominion Parliament has also exercised the right to legislate on insurance and insurance companies, and to enact regulations on their trade and business, making at least (not including those of the last session) thirty-one statutes of the Federal Parliament (and I have no doubt I have not counted them all), which, if the Respondent's contention should prevail, would fall to the ground as unconstitutional.

The consequence of the nullity of these statutes must be, amongst a great many others, that all the amendments made by the Dominion Parliament to the charters of the insurance companies existing before Confederation, all the charters granted to insurance companies by the said Parliament, are null and void ; that all their policies of insurance are so many pieces of blank paper ; that their shareholders are relieved from all liability whatsoever for the unpaid portions of their shares ; that all actions pending, in which any of these companies are parties, must fall to the ground. And, as to the License Acts, if they are illegal, of course these companies are not obliged to submit to them ; they are, moreover, not only free from the operation of these Acts for the future, but the Dominion Government is obliged to refund to them all that they have paid into the treasury under the said Acts, and to remit the many hundred thousands of dollars which they have deposited with the Government. Indeed, it is impossible to foresee the grave and stupendous consequence of the nullity of the Dominion legislation on these companies, and the complications which would necessarily arise therefrom.

In fact, the Citizens Insurance Company itself, the Appellant in this case, does not exist if the Federal Parliament has not the power of legislating on insurance companies and creating them.

And if the Federal Parliament had not the power to create the company (Appellant), to give it existence, the judgment itself, that the Respondent has obtained, is against a non-existing body, and, as such, must fall to the ground. He, in fact, then, has never been insured; he is the bearer of a mere shadow of a policy.

The Respondent is thus driven to admit that the Federal Parliament has the right to create and incorporate insurance companies. But then, if Parliament has this right, it can only be because these companies fall under the Federal control in virtue of the words "regulation of trade and commerce," in sec. 91 of the B. N. A. Act. "The power of creating a corporation, though appertaining to sovereignty, is not . . . a great, substantive, and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished"—per Marshall, C. J., in *McCulloch v. Maryland* (1); and upon this principle, it is to be presumed the framers of the B. N. A. Act have not deemed it necessary to grant in express terms to the Federal Parliament the power to incorporate railroad, shipping, telegraph or any other companies for the Dominion. Yet it cannot be questioned that it has such power. In the enumeration of the powers of the Provincial Legislatures, it has been deemed necessary, it is true, to include in express terms the incorporation of companies for Provincial objects, but that was undoubtedly because the power of creating a corporation appertains to sovereignty, and as such would not impliedly vest in the Provincial Legislatures, which clearly, by the Act, have none but the powers expressly given to them, whilst the Federal Parliament has all the other powers. And if the Federal Parliament has the power to create insurance companies, it has the power to regulate them—that is to say, to prescribe the rules under which they can carry on their trade, by which their trade is to be governed. The Respondent contends that, assuming these companies can be created by the Federal Parliament, their contracts, their policies fall under Provincial control, and that the Provincial Legislatures alone have the power to regulate these contracts and these policies.

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But are not these contracts, these policies, the trade and commerce of these companies? and is it not the regulation of trade and commerce itself that the B. N. A. Act vests, in express terms, in the Federal authority? Is this not contending against the very words of the Act, that the Federal authority can create or incorporate traders, but that it cannot regulate their trade? If such was the case, the Provincial Legislatures would have a power totally incompatible with the supremacy which the 91st section of the B. N. A. Act gives in such clear terms, to the Federal Parliament, over all the matters left under its control. Either the Federal Parliament has no control at all over insurance companies, or it has it supreme, entire and exclusive. If it has it, it has necessarily the power to regulate them, and to impose upon their contracts all the conditions or restrictions it may think advisable; it has the power, for instance, to enact a statute imposing upon the companies it has created the very conditions contained in the Ontario Fire Insurance Policy Act. And if it has that power, the Ontario Legislature has not got it. A contrary interpretation would be giving to one Government the power to create, and to the other the power to destroy; and to use the words of Marshall, C. J. (*loc cit.* p. 426):

“A power to create implies a power to preserve; a power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and to preserve, and where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.”

I really fail to apprehend upon what ground the Respondent, and the Ontario courts with him, whilst admitting the power of the Federal Parliament to incorporate insurance companies, can sustain the contention that the contract of insurance itself falls under Provincial control, simply because it is a *contract* or a *personal contract* governed by the local laws, and falling within the words “civil rights,” of the 92nd section of the B. N. A. Act. Certainly a personal contract is governed by the local laws; no one denies this; but the question to be determined here is, which is the local law, the law in Ontario on the subject? Is it the Dominion or the Provincial law? The Respondent would seem to treat the Dominion laws as foreign laws. He forgets that before the laws enacted by the Federal authority within the scope of its powers, the Provincial lines disappear; that for these laws we have a *quasi* legislative union; that these laws are the local laws of the whole Dominion, of each and every Province thereof; that the Dominion, as to such

laws, is but one country, having but one legislative power, so that a contract made under these laws in Ontario, or any one of the Provinces, is to be considered, territorially or with respect to locality, as a contract in the Dominion, and, as such, governed by the Dominion laws, and not as a contract locally in the Province, governed by the Provincial laws. This is why the contracts to convey passengers and goods on the railways under Dominion control—for instance, the contract made by the sender of a message with a telegraph company, the contracts of a sale of bank stocks—are all and every one of them, when made anywhere in the Dominion, regulated by the Federal authority. And the power of the Federal authority to so regulate them has never been doubted; yet are they not all local transactions and personal contracts? Undoubtedly so; but these railway companies, these telegraph companies, these banking companies, being under the Federal control, their contracts are necessarily under the same control, absolutely and exclusively. It would be impossible for them to carry on their business if each Province could impose upon them and their contracts different conditions and restrictions. A Dominion charter would be absolutely useless to them if the constitution granted to each Province the right to regulate their business. For the same reasons, the Federal Parliament, for instance, in the general railway Act of 1879, section 9, has enacted, as it had done in 1868, by the repealed Railway Act, that tenants in tail or for life, *grévés de substitution*, guardians, curators, executors, and all trustees whatsoever, may contract and sell their lands to the company. This is certainly an enactment on property and civil rights, yet I have never heard it doubted, during the twelve years that it has been on the statute book, that it is perfectly constitutional. Indeed, without it, the enactments of the Federal Parliament might be in some instances entirely defeated and set at nought. In the United States, the Federal power has in the same manner exercised its jurisdiction over civil rights and contracts. It having been settled, for instance, by judicial construction, that navigation was under Federal control, Congress has enacted laws regulating the form and nature of the contract of hiring the ships' crews (1). It has altered the obligations imposed by the common law on the contracts made by shipowners as common carriers, and though the validity of this enactment has never been directly decided upon by the Supreme

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(1) Pomeroy's Constitutional Law, par. 381.

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Court, it has been brought before that tribunal in such a way that their silence was equivalent to a positive and formal judgment in favour of its validity, as demonstrated in *Pomeroy's Constitutional Law* (1).

This court has, in various cases, held that the Federal Parliament, on the matter left under its control by section 91 of the B. N. A. Act, must have a free and unfettered exercise of its powers, notwithstanding that, by doing so, some of the powers left under Provincial control by section 92 of the Act might be interfered with. And this doctrine has been approved of by the Privy Council as directly as possible in the case of *Cushing v. Dupuy*, decided a few weeks ago, April 15th, 1880 (2). In that case it was contended by the Appellant that the provisions of the Dominion Insolvency Act were *ultra vires*, because they interfered with property and civil rights, as well as with the procedure in civil matters, all of which are assigned exclusively to the Provincial Legislatures by the B. N. A. Act. But that contention was disapproved of by their Lordships in the following terms: "The answer to these objections is obvious. It would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates, without interfering with and modifying some of the ordinary rights of property and other civil rights, nor without providing some mode of special procedure for the vesting, realisation and distribution of the estate and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is, therefore, to be presumed—indeed, it is a necessary implication—that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as a general law relating to those subjects might affect them." (That is to say, I take it, so far as a general law relating to bankruptcy and insolvency might affect property and civil rights or procedure.) And their Lordships held that consequently the Dominion Parliament had, in bankruptcy and insolvency, rightly exercised the power to revoke, alter or amend a certain article of the Quebec Code of Civil Procedure.

In the course of his very able argument before us, in one of these cases in favour of the constitutionality of the Fire Insurance Policy

Act, the learned Attorney-General for Ontario enunciated the proposition that the Federal authority may have the power to incorporate insurance companies, but that, if it has it, it is only in virtue of its general power under section 91 of the B. N. A. Act, to make laws for the peace, order and good government of Canada, and that this power must be limited to the creation of these companies, and does not extend to the regulation of their business and contracts, over which the Provincial authority alone, as he contends, has jurisdiction as matters falling within the words "property and civil rights" of the 92nd section. I have already said why, in my opinion, the powers to create and regulate cannot be in such a manner divided. I will only here add, that this proposition of the learned Attorney-General seems to me entirely opposed to the very words of section 91, in which it is enacted in very clear terms that this general power of the Federal authority to make laws for the peace, order and good government of the Dominion, cannot be exercised in relation to any of the matters coming within the class of subjects exclusively assigned by the Act to the Provincial authority. Now, the statutes creating and incorporating insurance companies, and enabling them, as bodies corporate, to make contracts of insurance, are clearly in relation to the subject of insurance; so that, if the Federal Parliament has the right to incorporate these companies, as it seems to me clear it has, and as the Respondent and the Ontario courts are forced to admit, insurance cannot be deemed to come within the classes of subjects put under Provincial control by the words "property and civil rights" of the 92nd section of the B. N. A. Act. The Federal Parliament cannot extend its own jurisdiction by a territorial extension of its laws, and legislate on subjects constitutionally Provincial, by enacting them for the whole Dominion, as a Provincial Legislature cannot extend its jurisdiction over matters constitutionally Federal, by a territorial limitation of its laws, and legislate on matters left to the Federal power, by enacting them for the Province only, as, for instance, incorporate a bank for the Province. The B. N. A. Act is not susceptible of a different construction without eliminating from section 91 thereof the controlling enactment that the general power of the Central Parliament to make laws for the peace, order and good government of the whole Dominion, *does not extend to the subjects left to the Provincial legislative power, and that, notwithstanding anything in the Act, the authority of the Central Parliament over the matters enumerated, as left under its control, is exclusive, as also without*

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eliminating from section 92 of the Act, the enactment that the Provincial Legislatures have *exclusive* power over the matters therein enumerated. And this cannot be done. It would be declaring that neither one nor the other has exclusive powers, whilst it is clearly intended by the Act that the powers of both should be exclusive. And upon this principle, I presume—for the reasons are not given at length, and it was before I came to this court—a Bill to incorporate the Christian Brothers as a Dominion body, which was referred to the judges of this court by the Senate in 1876, was reported by them to be unconstitutional, and *ultra vires* of the Federal Parliament (1). This Bill purported to incorporate a company of teachers for the Dominion, and consequently, as such, infringed on the powers of the Provincial Legislatures, in which is vested, by section 93 of the B. N. A. Act, the exclusive control over education; and the learned judges, by declaring it unconstitutional, recognized the principle that for a matter constitutionally Provincial, the Federal Parliament has not the power to incorporate a company for the Dominion. And that this is so, seems to me clear; but then it is as clear upon the same principle that the Federal Parliament could not incorporate insurance companies, nor legislate in any manner whatsoever on their trade and business, if insurance was a matter constitutionally Provincial—that is to say, left under Provincial control by the B. N. A. Act.

I say, then, to the Respondent: “If legislation on insurance is left to the Provincial Legislatures by the B. N. A. Act, the Federal Parliament had not the power to create the Citizens’ Insurance Company, and then you were never insured. If, on the contrary, the power of legislation over insurance is left to the Federal authority, then this power is supreme and exclusive; the Federal authority alone can regulate this trade in all its details, and the Ontario statute which purports to do so is *ultra vires* and unconstitutional. In either case, the judgment rendered in your favour in the courts below must be reversed and the appeal allowed. (It is admitted that, if the Ontario statute is *ultra vires*, the appeal is to be allowed.)

However, I feel it my duty not to avoid deciding the main question raised in this case, and I hold, for the reasons hereinbefore given, that the Federal Parliament has the right to incorporate insurance companies and to regulate them and their trade and

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(1) Journal of Senate, 1876, pp. 155, 206.

business ; that this right is exclusive, and that consequently the Ontario Legislature has exceeded its powers in enacting the Fire Insurance Policy Act. It cannot be, according to both the letter and the spirit of the B. N. A. Act, that one Government could have the right to incorporate these companies, and another Government the right to regulate them and their trade and business. It cannot be that the Provincial Legislatures could thus have it in their power to retard and impede, burden and impair, obstruct and even defeat the enactments of the Federal authority.

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The laws promulgated for the Dominion by the Federal Parliament, under the provisions of the Imperial Act, must have their full sway from the Atlantic to the Pacific, unrestrained by any other legislative body, free from Provincial control, without hindrance from Provincial legislation. On the application of this rule rest entirely for our country the safeguards against clashing legislation ; against concurrent jurisdiction ; against interfering powers ; against the repugnancy between the right in one Government to pull down what there is an acknowledged right in another to build up ; against the incompatibility of the right in one Government to destroy what it is the right in another to preserve (1). The Court of Appeal of Ontario goes so far as to say that an Insurance Company, created and authorized by the Dominion of Canada to do business throughout the whole Dominion, can be excluded from making contracts in the Province of Ontario by the Provincial Legislature ; and there is no doubt that it is so, if the Provincial Legislatures have, as held by the Ontario courts, the power to regulate the insurance trade. But this, in my opinion, demonstrates conclusively that the Provincial Legislatures have not, and cannot have, such a power of regulation.

If the Ontario Legislature can exclude an Insurance Company from the Province of Ontario, it must be conceded that all the other Provincial Legislatures have the same right in their respective Provinces ; so that, according to this theory, if all the Provincial Legislatures should exercise this right, a company created and authorized by the Federal Parliament to do business *all through the Dominion*, could not then do business *anywhere in the Dominion*.

But, may I ask here again, what would then be the use of a Dominion charter ? Clearly none whatever. Has the Imperial Parliament granted to the Federal authority a power so entirely

(1) *McCulloch v. Maryland*, 4 Wheaton, 316.



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useless and unsusceptible of any practical effect? The Constitutional Act does not, as I read it, bear an interpretation inevitably leading to such anomalous consequences; the powers of the Federal authority cannot, to such an extent, be dependent upon the consent and good-will of the Provincial authorities.

It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate Governments as to exempt its own operations from their influence, and it cannot be that the framers of our Constitution, who determined to give to the central power of this Dominion the supremacy and strength which, in the hour of trial, were found to be so much wanting in the Federal power of the United States, have thus given to a Province, or to all the Provinces uniting in a common legislation, the power to annihilate, either directly or indirectly, the corporation which the central power is authorized by the Act to create; that they have thus rendered inevitable in this Dominion that conflict of powers under which a federation must always, sooner or later, crumble and break down.

In *re The Western Insurance Company*, Appellant, and *Johnston*, Respondent, the appeal must also, in my opinion, be allowed, for the reasons I have given in the *Citizens v Parsons*.

The *Western* exists in virtue of an Act of the late Province of Canada; but, if insurance is a trade, the Acts on the subject passed before Confederation can now be repealed, altered or amended, by the Federal Parliament only, under section 129 of the B. N. A. Act.

In *The Queen Insurance Company v. Parsons*, also, the appeal must, in my opinion, be allowed. The company Appellant, in this case, being a foreign company, is on a slightly different footing than the *Citizens* and the *Western*. Yet if, upon the grounds I have stated, insurance companies and their trade and business fall under the regulations and control of the Federal Parliament, there are no reasons why foreign insurance companies should be held to be under Provincial control.

It is admitted (and my remarks here apply as well to the other two companies, which are also under license of the Federal Government) that this company, the Queen Insurance Company, has obtained from the Federal Government a license—that is to say, a permit—to do business all through the Dominion, under 38 Vict. c. 20, and 40 Vict. c. 42. Now, a license is a regulation, or rather, it is a permit to carry on a trade under certain regulations enacted by the licensor. (1)

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(1) *Calder v. Kirby*, 5 Gray, 597.

These regulations the Federal authority has made. To obtain its license, this company had to deposit \$50,000 with the Receiver-General of the Dominion (1); it had to file with the Dominion Government certain documents, and perform certain formalities enumerated in sections 10 and following ones of the said Act. Any business done before this deposit was made and these formalities fulfilled would have brought on the person doing such business a penalty of \$1,000 or an imprisonment for six months.

This company, moreover, is taxed by the Federal Government, sec. 23, sub-sec. 5. All these enactments are regulations on its trade and business. Having complied with them all, it could reasonably expect to have acquired some right, some privileges. "But that is not so," say the Respondent and the Ontario courts to the Appellant, or, at the most, if it is so, it is only as long as the Provincial Legislatures will suffer the permits and enactments of the Dominion authority. And when they please, instead of doing your business all through the Dominion of Canada, as the Federal authority has given you the right to do, you will be excluded from Canada altogether, either in express terms or indirectly, by these Legislatures imposing upon you, under their power to regulate your contracts, such onerous conditions that you will be forced to withdraw." Such is, according to the Respondent, the relative position of the Federal power towards the Provincial power, under the B. N. A. Act. I venture to think that our Constitution is not the solemn mockery that this interpretation, if it prevails, would make it be. Insurance business is a trade, and to the Federal authority belongs the "*exclusive*" power of regulation of that trade "*in each and every Province*" in the Dominion, and this is so (enacts section 91 of the Constitutional Act), *notwithstanding* that this power might interfere with the rights conceded to the Provincial Legislatures by section 92. This power to regulate excludes necessarily the action of all others that would perform the same operation on the same thing, and to the Federal Parliament alone must belong the right to impose upon the company Appellant and its policies the conditions and restrictions which this Ontario Fire Insurance Policy Act purports to impose, or any conditions or restrictions whatsoever.

These companies cannot be controlled and governed by as many different regulations as there are Provinces in the Dominion. It is

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(1) Sec. 6, 38 Vict. c. 42.

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by the comity of the Dominion that they are admitted here, and under the Dominion laws and power that they remain. One of the great benefits of Confederation would be lost if the rules on trade and commerce were not uniform all through the Dominion; if the Provincial Legislatures had, as contended by the Respondent, the power to tamper with the grants and privileges conferred by the Imperial Act does not give them. This is clear, and has always been held in this court to be the law. I have also not failed, as it was my duty to do, to give due consideration to the fact that the Respondent appears to have in his favour the weight and authority of the opinions of the learned judges of the Province of Ontario, though I may here remark that the judges of the Court of Queen's Bench, in one of these cases, *Western Assurance Co. v. Johnston*, distinctly stated that they did not express their individual opinions on this constitutional question, but yielded to the judgments already given.

I have not lost sight of certain enactments of the Federal Parliament, in which it seems to be admitted that the Provincial Legislatures have the right to incorporate insurance companies. But the Federal Parliament cannot amend the B. N. A. Act, nor give, either expressly or impliedly, to the Local Legislatures, a power which the Imperial Act does not give them. This is clear, and has always been held in this court to be the law. I have also not failed, as it was my duty to do, to give due consideration to the fact that the Respondent appears to have in his favour the weight and authority of the opinions of the learned judges of the Province of Ontario, though I may here remark that the judges of the Court of Queen's Bench, in one of these cases, *Western Assurance Co. v. Johnston*, distinctly stated that they did not express their individual opinions on this constitutional question, but yielded to the judgments already given.

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Upon the point as to the construction of the Act, assuming it to be not *ultra vires* of the Provincial Legislature, I retain the opinion expressed by me in *Geraldi v. The Provincial Insurance Company* (1) : that the true construction of the Act is that the statutory conditions set out in the schedule to the Act, whether omitted altogether, with or without others being substituted in their place, or whether some be omitted and others retained and new ones added, shall alone be regarded as being part of the policy, unless the conditions and variations, whether of omission, substitution or addition, shall be printed on the policy in the manner prescribed by the Act, the object being, that, to secure uniformity, no departure from the statutory conditions shall be recognized, unless the variations shall be endorsed in the manner prescribed in the Act. . . . .

But it is contended that the Act under consideration is *ultra vires* of the Provincial Legislature of Ontario, which passed it, as interfering with the regulation of a branch of trade and commerce—control over which is by the second item of section 91 of the B. N. A. Act vested exclusively in the Dominion Parliament.

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The question thus raised is, undoubtedly, one of a very grave character, for, as became developed in the argument of the several cases now before us, wherein the point is raised, one of which, namely, *The Western Assurance Company v. Johnston*, was argued by the Attorney-General, who is also the Premier of the Province of Ontario, in support of the constitutionality of the Act, the question before us is not one merely affecting the particular Act in question, but our judgment in this case, although the Dominion Parliament is not represented, and has not been heard in the matter, will logically affect some thirty Acts of the Dominion Parliament, whose constitutionality has not heretofore been questioned, and which must be *ultra vires* of the Parliament if the Act now before us be *intra vires* of the Provincial Legislature; and, on the contrary, if this Act be *ultra vires* of the Provincial Legislature, a number of Acts passed by the Legislature of the Province of Ontario must be equally so. It is clear that the subject-matter of the Act in question is not one over which jurisdiction is by the B. N. A. Act given concurrently to the Provincial Legislatures and to the Parliament. If it were, no doubt the Act would be valid “as long and so far only as it is not repugnant to any Act of the Parliament of Canada.” The subject not being one over which concurrent jurisdiction is given to the Provincial Legislatures and to the Parliament, must be placed exclusively either under the one or the other. The question, therefore, is determinable by the rule which I adopted in the *City of Fredericton v. The Queen* (1), as appearing to me to furnish an unerring guide in determining whether any given subject of legislation is within the jurisdiction of the Provincial Legislatures or of the Parliament, namely: “All subjects of whatever nature, not exclusively assigned to the Local Legislatures, are placed under the supreme control of the Dominion Parliament, and no matter is exclusively assigned to the Local Legislatures unless it be within one of the subjects expressly enumerated in section 92, and at the same time does not involve any interference with any of the subjects enumerated in section 91.”

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The contention in support of the claim that the Act is within the jurisdiction of the Local Legislature, is that the subject-matter of the Act comes within item 13 of section 92 of the B. N. A. Act, namely, "Property and Civil Rights in the Province."

I have already, in *The City of Fredericton v. The Queen*, expressed my opinion that the plain meaning of the closing sentence of section 91 is, that (notwithstanding anything in the Act) any matter coming within any of the subjects enumerated in the 91st section shall not be deemed to come within the class of subjects enumerated in the 92nd section, however much they may appear to do so. Jurisdiction, therefore, over "Property and Civil Rights in the Province" is not vested absolutely, but only qualifiedly, in the Local Legislatures.

In so far as jurisdiction over "Property and Civil Rights," in every Province, may be deemed necessary for the perfect exercise of the exclusive jurisdiction given to the Dominion Parliament over the several subjects enumerated in section 91, it is vested in the Parliament, and what is vested in the Local Legislatures by item 13 of section 92, is only jurisdiction over so much of property and civil rights as may remain, after deducting so much of jurisdiction over those subjects as may be deemed necessary for securing to the Parliament exclusive control over every one of the subjects enumerated in section 91—the residuum, in fact, not so absorbed by the jurisdiction conferred on the Parliament.

The only question, therefore, before us substantially is : Are or are not joint stock companies, which are incorporated for the purpose of carrying on the business of fire insurance, traders ? and is the business which they carry on a trade ?

If this question must be answered in the affirmative, the Act under consideration must be *ultra vires* of the Provincial Legislature, as much as was the Act which in *Severn v. The Queen* (1) was pronounced so to be, and as the Act under consideration in *The City of Fredericton v. The Queen* would have been if passed by a Local Legislature ; indeed, it seems to me to be difficult to conceive what greater assertion of jurisdiction to regulate trade and commerce there could be, than is involved in the assumption and exercise of the right to prescribe by Act of the Legislature in what manner only, by what form of contract only, by what persons only, and subject to what conditions only, particular trades, or a particu-

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(1) 2 Can. S. C. R. 70.

lar trade, may be carried on, and to prohibit their being carried on otherwise than is prescribed by the Act. If this may be done in one trade, obviously it may be done in every trade, and so all trades must be subject to the will of the Legislature having jurisdiction so to legislate as to whether it shall be carried on at all or not. As to the Act under consideration, if it be open to the construction put upon it by the courts below, it seems to me to be impossible to conceive any stronger instance of the assertion of supreme sovereign legislative power to regulate and control the trade of fire insurance and of fire insurance companies, if the business of those companies be a trade. Now, among all the items enumerated in sec. 92, it is observable that not one of them in terms indicates the slightest intention of conferring upon the Local Legislatures the power to interfere in any matter relating to trade or commerce, or in any matter which in any manner affects any commercial business of any kind, unless it be item No. 10, whereby the Local Legislatures are empowered exclusively to make laws in relation to "local works and undertakings" subject to this qualification, namely, "other than such as are of the following classes:"

"a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province ;

"b. Lines of steamships between the Province and any British or foreign country ;

"c. Such works as, although wholly situate within the Province, are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the Provinces."

All these excepted subjects are, by item 29 of section 91, placed under the exclusive legislative authority of the Parliament of Canada, and so, by the closing paragraph of section 91, are, in effect, pronounced not to be local or Provincial works or undertakings. Works and undertakings within each Province other than those excepted, are all, therefore, which can come within the description of "local works and undertakings" comprehended in item 10.

It is to be observed, also, that when power to incorporate companies is given, no mention is made of trading companies. The power is expressly limited by item No. 11, section 92, to "the incorporation of companies *with Provincial objects*." None of the

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learned counsel who contended for the validity of the statute under consideration ventured to define the term "Provincial objects;" they rather preferred to submit at large, that the item intended to confer power to incorporate companies for all purposes of trade, and, in fact, all purposes whether of trade or otherwise, provided only the corporate powers should be expressly prescribed by the Act to be exercised within the Province.

It is, perhaps, easier to say what the term does not comprehend than to define it precisely. I venture to suggest, however, that such local works and undertakings as are by item 10 placed under the Local Legislatures may properly be termed local or Provincial objects. So may the subjects enumerated in item No. 7, viz.: "The establishment, maintenance and management of hospitals, asylums, charities and eleemosynary institutions in and for the Province, other than marine hospitals;" and so likewise the item specified in section 93, namely, "Education;" and beyond these I cannot say that I see any other; but when we regard the whole scope and object of the B. N. A. Act, and bear in mind that the scheme of constitutional government which it was designed to create, was to vest in the Dominion Parliament, consisting of Her Majesty (herself the supreme executive authority) as one member, and a Senate and House of Commons as the other members of the Legislative body, the supreme sovereign jurisdiction to legislate upon all subjects whatsoever, excepting only certain specific matters *particularly* enumerated, purely of a local, domestic and private nature, which were assigned to the Provinces; and, when we find that for greater certainty (to expel doubt, as it were) the exclusive legislative jurisdiction of Parliament is declared to extend to all matters coming within the regulation of trade and commerce, words which (in perfect character with the general supreme jurisdiction intended to be conferred upon the Parliament, excepting only the *particularly* excepted subjects) are comprehensive enough to include, and must be construed to include, every trade and everything relating to every trade, and to all branches of commerce, and to the persons by whom, and to the manner in which the same, in every branch thereof, may be carried on; we can, I think, with great confidence, assert that no jurisdiction to *incorporate any trading company*, or to *restrain or control any trading company* in the way it should carry on its trade, is given to the Local Legislatures, unless it be in respect of companies for the construction, maintenance and management of such works as by item No. 10 are

placed under the control of the Local Legislatures, under the designation "local works and undertakings." From the frame of item No. 11, it is plain that what was intended by annexing the qualification "with Provincial objects," was not the power of incorporating companies for all purposes, but a limited power; for inasmuch as, wholly irrespective of these words, the Local Legislatures could give no powers beyond their Province to companies incorporated by them, these words "with Provincial objects" were superfluous, and have no sense unless they be read as words of limitation, having a restrictive operation; it would have been sufficient to have said simply, "the incorporation of companies;" but "for greater certainty," a principle which pervades the Act, I have no doubt these words "with Provincial objects" were introduced to confine the power to those purposes which are specially placed under the control of the Local Legislatures in express terms—so as to leave nothing to be implied or inferred. My brother Taschereau has, however, so forcibly dealt with this subject, that I shall discuss it no further, but shall proceed to the enquiry: "Are or are not joint stock companies which are incorporated for the purpose of carrying on the business of fire insurance, traders? and is the business so carried on by them a trade?"

It was admitted as beyond all question that the business of marine insurance is a trade, and that all companies carrying on that business are traders, and are in all matters subjected to the exclusive jurisdiction of the Dominion Parliament; but marine insurance policies invariably contain, and from the time of their first introduction did contain, provision for indemnity against loss by fire; and all text-books upon the subject of insurance are careful to impress the doctrine that fire insurance is but the offspring of marine insurance; that nothing was more natural or more reasonably to have been expected, than the conversion of the security which had long afforded protection against injury to ships, occasioned by fire, to the purpose of yielding protection to property on land; that it was the calamitous fire in London, in 1667, which hastened the application of this provision in marine policies to the protection of property by land; and that, as Magens says, there were few merchants in London in 1755 who were not insured, as well for their protection, as for the greater credit, both at home and abroad, which they enjoyed in their commercial transactions, from its being known that the great capitals lying in their houses and warehouses are thus secured from the flames; that the utility, both in a public

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and a private point of view, as an incentive to industry and enterprise, and the promotion and advancement of trade, is as great in contracts of fire insurance as in those of marine insurance, and indeed greater, by so much as the amount secured by contracts of insurance against fire largely exceeds that secured by those against marine risks ; that contracts of fire insurance are governed by the same general principles as marine policies, and that the solution of any question that may arise upon an insurance against fire, will be found by a careful application of the doctrine of marine insurance ; and that the law most reasonably presumed originally that persons who entered into contracts respecting fire insurance were acquainted with, and *had in their contemplation, the custom of merchants and legal rules affecting marine insurance, and intended that those new contracts should be construed and controlled by the same means.* No reason, therefore, exists for regarding the business of marine insurance to be a trade and a branch of commerce, and that of fire insurance not to be. The only difference in fact between them is, that policies against fire are almost invariably effected by companies formed for the express purpose of carrying on the business ; so forming mercantile partnerships, having within themselves the desirable requisites of security, wealth and numbers, which afford them the means of defraying heavy losses, while marine insurance risks are usually taken by individuals.

That the Imperial Parliament had no doubt as to fire insurance companies being traders, and their business a trade, appears from the Joint Stock Companies Act, 7 and 8 Vict. c. 110, and the Companies Act of 1862, by the former of which every assurance company or association, whether for the purpose of insurance on lives, or against any contingency involving the duration of life, or against the risk of loss or damage *by fire*, or by storm, or by other casualty, or against the risk of loss or damage to ships at sea, or on voyage, or to their cargoes, or for granting or purchasing annuities on lives, are all alike brought under the Act, and are obliged to be registered under the Board of Trade ; and by the latter of which all were alike obliged to furnish half-yearly to the Board of Trade a full statement of the liabilities and assets of the companies, and by which also the *commercial* privilege of limited liability was extended to them. Neither do the members of the Mercantile Law Commission appointed in 1853, nor the legal and mercantile gentlemen to whom questions were submitted by that Commission, appear to have had any doubt upon the point.

That Commission was appointed to enquire and report how far the mercantile law in the different parts of the United Kingdom might be advantageously assimilated, and also whether any and what alterations and amendments should be made in the law of partnership, as regards the question of limited and unlimited responsibility of partners. The commissioners, in their first report, reported against any alterations being made in the mercantile law, which the majority approved of as it stood. Mr. Baron Bramwell, who was a commissioner, and in the minority, expressed his opinion, which accompanied the report, in favour of a change, wherein, among other things, he says :

"No doubt we are not called upon to consider the general law of partnership, but it is important to refer to its condition, to ascertain how far the proposed change would be a change, how far a novelty to the public, and what present mischief it might prevent.

"Now, the law does at this present moment permit partnerships with limited liability; *many Insurance Companies*, though unchartered, are carried on on that principle, and I conceive *all other trades* or businesses theoretically may be so conducted."

Mr. Slater, who was also on the Commission and in the minority, in an opinion of his, which also accompanied the report, says :

"Under certain restrictions and regulations, *Joint Stock Companies* for banking, not being banks of issue, *Insurance Companies* and companies of a decided public character, possessing a large subscribed capital, might be permitted to conduct their business upon a principle of limited liability, *because their establishment would be advantageous to the trading and commercial interests of the country.*"

Among the questions submitted by the Commission to leading legal and mercantile gentlemen throughout the United Kingdom and the United States of America, was the following :—

"Would you make the limited responsibility of partners applicable to private or ordinary partnerships, as well as to Joint Stock Companies? Would not this unduly interfere with the free competition of industry on the part of individual traders or small partnerships with unlimited liability? Would you apply it to partnerships for banking or insurance?"

To this question Mr. James Andrew Anderson, then late manager of the Union Bank of Scotland, answered :—

"Banking and Insurance Companies are those of all others which, in my opinion, ought to enjoy no exemption from unlimited responsibility, not only on account of the magnitude; but of the

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multitude, of their dealings; *there are now fewer branches of business which seem less to require the stimulus of limited liability than banking and insurance.*"

Mr. James Stewart, barrister-at-law, answered:

"I apprehend that a limited liability is already applied to partnerships for insurance, as in the policies of all the companies with which I am acquainted, the claim of the assured is limited to the capital stock of the company."

Mr. William Valentine, President of, and selected by, the Chamber of Commerce, Belfast, answered:

"I would make limited responsibility applicable to private partnerships, as well as to public companies generally; *but, as banking and insurance partnerships have dealings with the general public in districts remote from the localities in which they are established, and it being difficult to obtain correct information in such remote districts as to the extent of the capital and condition of their liabilities, I would continue the unlimited responsibilities of such companies.*"

Mr. Donald McLaren, merchant, selected by the Chamber of Commerce, Leith, to answer the questions, answered:

"As regards *Insurance Companies*, I believe that many of the companies in this country, by a special clause in their policies, limit their liability to the capital stock of the company, and in the city of Hamburg there are a great number of companies who have for a long period carried on extensive business, *both in marine and also in fire insurance*, the liability of each shareholder being limited to the amount of his subscription, and the system has been found most satisfactory to the shareholders as well as the public."

Mr. John Slagg, merchant, selected by the Chamber of Commerce, Manchester, answered as follows:

"I do not think there should be any change in the present law (that is, the mercantile law), unless it be that all existing companies, such as '*Railway and Insurance Companies*,' should be brought into the same position as other '*mercantile firms*.'"

And, finally, the author of the "*Wealth of Nations*," one hundred years ago, in his world accepted work, in book v. ch. 1, under the title of "the public works and institutions which are necessary for facilitating particular branches of commerce," says:

"*The only trades which it seems possible for a Joint Stock Company to carry on successfully without any exclusive privilege, are those of which all the operations are capable of being reduced to*

what is called a routine, or to such a uniformity or method as admits of little or no variation. Of this kind are :—1st. The banking trade ; 2nd. The trade of insurance from fire, and from sea risk, and capture in the time of war ; 3rd. The making and maintaining a navigable cut or canal ; and 4th. The similar trade of bringing water for the supply of a great city.

“The value of the risk, *either from fire or from loss by sea or capture*, though it cannot perhaps be calculated very exactly, admits, however, of such gross estimation as renders it in some degree reducible to strict rule and method ; *the trade of insurance, therefore*, may be carried on by a Joint Stock Company without any exclusive privilege.”

When we regard the magnitude of the business of fire insurance, in which alone, in 1860, a sum exceeding one thousand one hundred and thirteen millions of pounds sterling was at risk in Great Britain, the annual premiums in respect of which amounted to nearly six millions sterling, a sum five times as great as that derived from marine insurance risks ; and when we observe by the report of the Superintendent of Insurance appointed by the authority of the Dominion Parliament, that there were in 1869 —

Five Canadian Insurance Companies, having at risk in the Dominion of Canada .....	\$ 59,340,916.00
And twelve British Companies, having at risk ....	115,222,003.00
And two American Companies, having at risk ....	13,796,890.00
Amounting in all to .....	<u>\$188,359,809.00</u>
Which, in 1877, had increased to thirteen Canadian Companies, having at risk .....	\$217,745,048.00
Twelve British Companies, having at risk .....	184,304,318.00
Three American Companies, having at risk .....	18,293,315.00
Amounting in all to .....	<u>\$420,342,681.00</u>

And when we consider that, but for the business of fire insurance, the trade and commerce of the world could never have attained the magnitude and success and exalted position which they have attained, we may well say, in my judgment, that the trade of fire insurance is, *par excellence*, the trade of trades, without which all other trades would have dwindled and decayed.

Against the position supported by the above vast concurrence of opinion, with the reason of the thing, we have been referred to some observations reported to have been made by Mr. Justice Field,

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in the Supreme Court of the United States, in *Paul v. Virginia* (1); but Mr. Justice Field himself explains, in the *Pensacola Telegraph Co. v. Western Telegraph Co.* (2), that all that was decided or intended to be decided in *Paul v. Virginia* was :—

“That the power of Congress to regulate commerce was not affected by the fact that such commerce was carried on by corporations, but that a contract of insurance, made by a corporation of one State upon property in another State, was not a transaction of *inter-State* commerce.”

The Parliament of Old Canada, which comprised the territory now constituting the Provinces of Quebec and Ontario, when applying to the Imperial Parliament for the passage of the B. N. A. Act, was not ignorant that by the Civil Code of Lower Canada, which was enacted into law by an Act of the Parliament of Old Canada, the contract of fire insurance, when made for a premium by persons carrying on the business of insurers, is a commercial contract. It was therefore upon the same basis as a marine insurance, which, by the same article of the Code, 2470, is declared to be always a commercial contract, and this is given not as new, but as old law. Now, it is impossible to conceive that the B. N. A. Act contemplated dealing with the same subject as a branch of trade and commerce in one Province of the Dominion, and in another as not—in one as subject to the Dominion Parliament, in another to the Local Legislature. I have shewn that in England fire insurance has always been regarded to be a trade equally as *marine* insurance, and to have emanated from the latter, and to be governed by the same principles and the same mercantile law as governed marine insurance. There can therefore, in my judgment, be no doubt that in the contemplation of the B. N. A. Act, all insurance, whether of lives, or of real or personal property, and whether against risk by fire on land or on sea, or by storm on land or sea, or by any other casualty, must be equally regarded as branches of trade and commerce, and must all alike be under the jurisdiction of the Dominion Parliament. There can, I think, be no doubt that the object of the B. N. A. Act, in placing “*all matters coming within*” the term “*regulation of trade and commerce*,” under the exclusive control of the Dominion Parliament, was to secure a perfect uniformity in all the Provinces of the Dominion, as to *all matters whatsoever* affecting all trades, as an essential condition to the

(1) 8 Wallace, 168.

(2) 6 Otto, or 96 U. S. Rep. 21.

prosperous carrying on of trade, and to prevent all possible interference or intermeddling with any trade, which diverse local views entertained in the different Provinces of the Dominion might be disposed to attempt, if the subject was placed under local jurisdiction, whether by prescribing a particular form of contract and prohibiting any other being used, or by prescribing a particular mode of execution of the contract, or by assuming to dictate in any other manner as to the manner in which or the terms subject to which trading companies or other persons engaged in any particular trade should be permitted to carry on such trade. The inconvenience which would attend the carrying on fire insurance business may well be conceived to be highly injurious to the interests of persons engaged in that trade, if they should be restrained from entering into contracts in the terms in which persons desirous of having their property insured may be willing to contract with them, and should be compelled to give up business, unless they should adopt a particular form of contract, executed in a particular manner, and subject to particular conditions, totally different in each Province; and if they should be subjected to different penalties, forfeitures and consequences, in each, if the forms prescribed in each should not be followed; so likewise, how inconvenient it would be if companies empowered, as many are, to carry on marine as well as fire insurance, should as to one contract be subject to the Dominion Parliament, and as to the other to a Local Legislature. Now, that the Act under consideration, which assumes to prohibit all fire insurance companies, whether composed of foreigners or of British subjects, and whether incorporated by foreign states, or by the Imperial Parliament, from carrying on their trade in the manner authorized by their respective charters of incorporation, and from entering into such contracts as persons willing to deal with them may agree upon, or from entering into any contract in the way of their trade, subject to any other conditions, or in any other form than prescribed by the statute, and that in default of adopting the prescribed form, the parties contracting with them, although violating all the conditions upon which alone the companies entered into the contracts, shall recover against the companies, notwithstanding that, in the contracts in fact entered into, they had consented that, in the event which had happened, the companies should incur no liability—that such an Act is one which assumes to regulate and control, and in a very marked manner to interfere with the trade of fire insurance, does

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not, in my judgment, admit of a doubt. Such an Act may safely, with greater propriety, be said to regulate the trade of fire insurance, and so to relate to a matter coming within the term "regulation of trade and commerce," than the 4th and 17th sections of the Statute of Frauds. That the 17th section of that statute effects a regulation of trade and commerce, will not, I presume, be doubted; and the Imperial Parliament has furnished us with proof that, in the estimation of that power, to which the B. N. A. Act owes its existence, the 4th section does the same, for by the 19th and 20th Vict. c. 97, intituled "An Act to amend the laws of England and Ireland *affecting trade and commerce*," after reciting that —

"Whereas inconvenience is felt by persons engaged in trade by reason of the laws of England and Ireland being, in some particulars, different from those of Scotland in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience, it is expedient to amend the laws of England and Ireland as hereinafter is mentioned ;"

it was enacted among other things :—

"Sec. 3. No special promise to be made by any person after the passing of this Act to answer for the debt, default or miscarriage of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document ;"

and by the 16th section, the title given to the Act in citing it is :  
"The Mercantile Law Amendment Act of 1856."

Now, if this amendment of the 4th section of the Statute of Frauds so affects trade and commerce as to find its proper place in a "Mercantile Law Amendment Act," can there be a doubt that the Ontario Fire Insurance Act of 1876, assuming, as it does, to prescribe the only manner in which, and the terms upon which, the trade of fire insurance may be carried on in Ontario, is an Act which assumes to introduce a new regulation of trade and commerce into the mercantile law of Ontario, and so usurps the jurisdiction of the Dominion Parliament, in which, for the purpose of preserving uniformity in matters of trade throughout all the Provinces of the Dominion, the exclusive power to enact all laws in any manner affecting trade and commerce is vested ?

The mischief of this legislation lies deeper than appears upon the surface. The germ of that mischief appears in the judgments of some of the learned judges of the Court of Appeal in Ontario, and was more fully developed in the argument of the Attorney-General of Ontario, in his argument before us in *Johnston v. Western Assurance Co.*; the logical result of which, if well founded, would be, in my judgment, to undermine the fabric which the B. N. A. Act designed to erect.

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In the *Citizens Assurance Company, Appellants, v. Parsons, Respondent*, one of the learned judges of the Court of Appeal in Ontario makes use of the following language (1): "The Parliament of the Dominion has no power to authorize a Company"—that is, a Fire Insurance Company, of its creation—"to make contracts in Ontario, except such as the Legislature of that Province may choose to sanction;" they—that is, the Legislature of the Province—"may, if they think proper, *exclude such corporation from entering into contracts of insurance here altogether*, or they may exact any security which they may deem reasonable for the performance of its contracts.

"The artificial being created by the charter is authorized to make such contracts as come within its designated purposes, but the Legislature granting the charter can give no privileges to be exercised within any of the Provinces, except with their assent and recognition; and it follows, as a matter of course, *that these may be granted upon such terms and conditions as the Provinces think fit to impose.*

"Within their respective limits, each Legislature is supreme and free from any control by the other. The Dominion Parliament has no more authority to interfere with, or regulate contracts of this nature"—that is to say, contracts of fire insurance—"within any of the Provinces, than has the Legislature of the Province to attempt to regulate promissory notes or bills of exchange. *The terms upon which insurance business is to be carried on within the Province is a matter coming exclusively within the powers of the Local Legislature*, and any legislation on the subject by the Dominion would be *ultra vires*. All that the Legislature has done in the case of the present Company is to enable it, in its corporate capacity, to carry on the business of insurance, but the Local Legislature has the exclusive discretion as to the conditions under which it"—that is, the business

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(1) [See 1 App. Rep. pp. 100, 101.]



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of insurance—"shall be carried on within the confines of the Province."

If this be law, it must be admitted that the imputation charged against the Dominion Parliament—that they have encroached upon the jurisdiction of the Local Legislatures—is well founded; in fact, it may be admitted that in every session of the Parliament's existence it has passed Acts which, if the above be law, would have to be pronounced to be *ultra vires*, to the extent of invalidating from 30 to 40 Acts. If the Local Legislature had jurisdiction to pass the Act under consideration, it is obvious that it has the like jurisdiction over all other trades, so that what is asserted on behalf of the Local Legislatures is the *exclusive right to legislate in such a manner as to regulate and control all trades*, and to exclude, "*if they think proper*," *all persons and corporations, as well foreign as domestic, from carrying on their respective trades within the Province of Ontario*. Now, I freely admit that the Local Legislatures have the right so to legislate, if they have the power to pass the Act under consideration, but I add that they have only the like power in each case; that they have no more power or jurisdiction to pass the one species of Act than the other; that they have no more power or jurisdiction to pass an Act to regulate or control the terms under which a trade may be carried on, than they have to prohibit it altogether from being carried on within the limits of the Province. The former power is indeed but the exercise of, and is comprehended in, the latter, for an Act to control and regulate a trade is, in effect, to prohibit the carrying on of the trade *at all, otherwise* than upon and subject to the prescribed regulations; but the right to exclude, for example, foreign traders, be they corporations or individuals, from carrying on their trade in a country, can only be asserted in virtue of, and as incident to, Supreme National Sovereignty. An Act of exclusion, equally with an Act to control and regulate the manner in which a trade shall be carried on, can only be vindicated upon the principles governing what is called the Comity of Nations, the administration of which belongs exclusively to Supreme National Sovereignty. Now, the Provinces of the Dominion of Canada, by the wise precaution of the founders of our constitution, are not invested with any attribute of National Sovereignty. The framers of our constitution, having before their eyes the experience of the United States of America, have taken care that the B. N. A. Act should leave no doubt upon the subject.

Within this Dominion the right of exercise of National Sovereignty is vested solely in Her Majesty, the Supreme Sovereign Head of the State, and in the Parliament of which Her Majesty is an integral part; these powers are, within this Dominion, the sole administrators and guardians of the Comity of Nations. To prevent all possibility of the Local Legislatures creating any difficulties embarrassing to the Dominion Government, by presuming to interfere in any matter affecting trade and commerce, and by so doing violating, it might be, the Comity of Nations, all matters coming within those subjects are placed under the exclusive jurisdiction of the Dominion Parliament. That the Act in question does usurp the jurisdiction of the Dominion Parliament, I must say I entertain no doubt. The logical result of a contrary decision would afford just grounds to despair of the stability of the Dominion. The object of the B. N. A. Act was to lay in the Dominion Constitution the foundations of a nation, and not to give to Provinces carved out of, and subordinated to, the Dominion, anything of the nature of a national or *quasi* national existence.

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True it may be, that the Acts of the Local Legislatures affecting the particularly enumerated subjects placed by the B. N. A. Act under their exclusive control, if not disallowed by the Dominion Government, are supreme in the sense that they cannot be called in question in any court; but this supremacy is attributable solely to the authority of the B. N. A. Act, which has placed those subjects under the exclusive control of the Local Legislatures, and is not, in any respect, enjoyed as an incident to National Sovereignty.

To enjoy the supremacy so conferred by the B. N. A. Act, these Local Legislatures must be careful to confine the assumption of the exercise of the powers so conferred upon them, to the particular subjects expressly placed under their jurisdiction, and not to encroach upon subjects which, being of national importance, are for that reason placed under the exclusive control of the Parliament.

How the species of legislation which appears upon the statute books, upon the subject of insurance and insurance companies, came to be recognized (by which it would seem as if the Parliament and the Legislatures had been attempting to make among themselves a partition of jurisdiction, for which the B. N. A. Act gives no warrant whatever), I confess appears to me to be very strange, for it surely cannot admit of a doubt that *no act* of the Dominion Parliament can give to the Local Legislatures jurisdiction over any subject which, by the B. N. A. Act, is placed exclusively under the

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control of Parliament ; and as the Parliament cannot by Act or acquiescence transfer to the Local Legislatures any subject placed by the B. N. A. Act under the exclusive control of Parliament, so neither can it take from the Local Legislatures any subject placed by the same authority under *their* exclusive control. There is nothing in the B. N. A. Act to justify the conclusion that the subject of insurance is placed under the concurrent jurisdiction of the Local Legislatures and of the Parliament : if it were, the latter could itself apply the necessary remedy by an Act controlling the Legislature of the former. The subject, then, not being one of concurrent jurisdiction, must be under the *exclusive control*, either of the Parliament or of Local Legislatures ; there can be no partition of the jurisdiction.

It is impossible to estimate the embarrassments which will be occasioned by the species of legislation which has been adopted, if not promptly checked and corrected. The only way of correcting the evil is to determine by an irreversible judicial decision to which authority the exclusive jurisdiction belongs—namely, whether to the Parliament or to the Local Legislatures. In my judgment, it belongs, without doubt, to the Parliament.

The arrival, by the majority of this court, at a contrary conclusion, will, I fear, justly expose their judgment to the imputation that it will be impossible, as I confess I think it will be impossible, to reconcile that judgment with the principle upon which *Severn v. the Queen*, and *The City of Fredericton v. the Queen*, have been decided ; and that it will have the effect of unsettling, rather than of settling, the law upon a most grave constitutional question.\*

[The omitted portions of the above judgments relate to the construction of the Act of the Legislature of Ontario, 39 Vict. c. 24.]

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\* The judgment of the Privy Council in the above cases is reported 7 App. Cas. 96.

## PRIVY COUNCIL.

THE REV. ROBERT DOBIE ..... *Appellant*,

J. C. \*

AND

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THE "BOARD FOR THE MANAGEMENT OF THE  
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TERIAN CHURCH OF CANADA IN CON-  
NECTION WITH THE CHURCH OF SCOT-  
LAND" AND OTHERS..... *Respondents*.

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*On appeal from the Court of Queen's Bench for Lower Canada, in the  
Province of Quebec.*

[Reported 7 App. Cas. 136.]

*B. N. A. Act, 1867, ss. 91, 92, 129—Canada Act, 22 Vict. c. 66—  
Invalidity of Quebec Act, 38 Vict. c. 64.*

The powers conferred by the B. N. A. Act, 1867, s. 129, upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867.

The Act, 22 Vict. c. 60, of the Province of Canada, which created a corporation having its corporate existence and rights in the Provinces of Ontario and Quebec, afterwards created by the B. N. A. Act, could not, after the B. N. A. Act, be repealed or modified by the Legislature of either of these Provinces, or by the conjoint operation of both Provincial Legislatures, but only by the Parliament of the Dominion.

The Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66, and (1) to destroy a corporation which had been created by the Parliament of the Province of Canada before the B. N. A. Act, and to substitute a new corporation; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the Province, was held invalid.

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\* Present:—Lord Blackburn, Lord Watson, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, Sir Richard Couch, and Sir Arthur Hobhouse.

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*Citizens Insurance Company of Canada v. Parsons* (7 App. Cas. 96, ante, p. 265), approved and distinguished.

The first step to be taken with a view to test the validity of an Act of a Provincial Legislature under the B. N. A. Act is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in section 92, which states the legislative powers of the Provincial Legislatures. If it does not come within any of such classes, the Provincial Act is of no validity. If it does, these further questions may arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, which states the legislative powers of the Dominion Parliament, and whether the power of the Provincial Legislature is or is not thereby overborne.

Appeal on special leave from a judgment of the Court of Queen's Bench (June 19, 1880), affirming a judgment of the Superior Court of the District of Montreal (Dec. 29, 1879).

The subject-matter of the appeal was a certain fund eventually known as the "Temporalities Fund." The Acts of Parliament which relate to the creation of the fund are 14 Geo. III. c. 88, 81 Geo. III. c. 31, 7 and 8 Geo. IV. c. 62, 3 and 4 Vict. c. 78, and 16 Vict. c. 21.

In pursuance of authority given by [Imperial Act] 16 Vict. c. 21, the Province of Canada passed the [Provincial] Act 18 Vict. c. 82, in consequence of which the Presbyterian Church of Canada in connection with the Church of Scotland (the appellant being one of its members), in accordance with a resolution of its Synod dated the 11th of January, 1855, arranged with the Government for the creation of a fund (called the Temporalities Fund) of £127,448 5s.; and an Act of Incorporation for the management thereof was obtained, being 22 Vict. c. 66, of the Province of Canada, in accordance with which a Board was elected and administered the fund thereunder.

In the year 1874 it was determined to unite the said Church with three other churches. Subsequently, Ontario

Act 38 Vict. c. 75, and Quebec Act 38 Vict. c. 62, were passed to give effect to such union; and contemporaneously therewith Quebec Act 38 Vict. c. 64, was passed to amend Canadian Act 22 Vict. c. 66, with a view to the union of the four churches, and to provide for the administration of the Temporalities Fund.

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On the 14th of June, 1875, a Synod of the said Church resolved by a large majority (the appellant and nine others dissenting) that the union be effected, and various resolutions were adopted with that view. The appellant and the nine other dissentients protested that they and their adherents remained and still constituted the said Church.

On the 30th of December, 1878, the appellant commenced the proceedings in this suit which, together with the circumstances out of which they arose, are set out in the judgment of their Lordships.

The questions decided in this appeal are—1, as to the invalidity of Quebec Act 38 Vict. c. 64; 2, as to the plaintiff's right to sue; 3, as to the effect of the resolutions from which he dissented.

Horace Davey, Q.C., and McMaster, of the Canadian Bar (Fullarton with them), for the appellant, contended that the Quebec statutes (38 Vict. cc. 62 and 64) and the Ontario statute (38 Vict. c. 75) were, in respect of the provisions material to the case, *ultra vires* and illegal. Reference was made to the B. N. A. Act, 1867, s. 129, ss. 91 and 92, sub-ss. 7, 13, 16, 11. See also *L'Union St. Jacques de Montreal v. Belisle* (1); *Dow v. Black* (2); *Cushing v. Dupuy* (3). With regard to the meaning of property and civil rights in section 92, sub-s. 13, see Todd's Parliamentary Government in British Colonies, p. 396. As to the state of the Canadian Constitution

(1) L. R. 6 P. C. 31; *ante*, p. 63.

(2) L. R. 6 P. C. 272; *ante*, p. 95.

(3) 5 App. Cas. 409; *ante*, p. 252.

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before 1867, see 3 and 4 Vict. c. 35, s. 42, and 3 and 4 Vict. c. 78, s. 3.

It was also contended on behalf of the appellant that the Canadian Act 22 Vict. c. 66, was still in force, and valid and binding on the respondent corporation and the fund in suit. By virtue thereof the respondents individually and the respondent corporation have acted *ultra vires* and illegally in assuming to administer the fund under the provisions of the Provincial Acts. The Board is at present illegally constituted. The Presbyterian Church of Canada in connection with the Church of Scotland is the body beneficially interested in the fund in suit. The Presbyterian Church in Canada is not identical therewith. This latter body is composed of a considerable party in the former body, who practically seceded therefrom and formed a union with three other churches, becoming a new corporation by virtue of the said Provincial Acts, which purported to transfer to it the funds of all four churches. The appellant and nine others were opposed to that union, and claim that they are now the Presbyterian Church of Canada in connection with the Church of Scotland—a corporation created by the Canadian statute, and exclusively entitled to the Temporalities Fund. Neither the Provincial Acts, nor a resolution of a Synod of each of the four churches, declaring that the united Church was identical with itself, and possessed of the same authority, rights, privileges, and benefits, were operative to establish any identity between the united Church and the corporation created by 22 Vict. c. 66.

The appellant's *locus standi* is as a minister of the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, and as one of those entitled in 1853, and ever since, to share in the proceeds of the Clergy Reserve Fund, and as one of the founders of

the Temporalities Fund under the minutes of the Synod of January 11, 1855, and as interested in that fund under 22 Vict. c. 66, and the other statutes in that behalf. He claims that the Presbyterian Church in Canada is not entitled to the rights, property, and status of the Church to which he belongs, and which is alone entitled to the rights and property reserved thereto by 22 Vict. c. 66.

Reference was made to *Attorney-General v. Welsh* (1); *Attorney-General v. Munro* (2); *Attorney-General v. Murdoch* (3); *Shore v. Wilson* (4); *Attorney-General v. Pearson* (5).

Benjamin, Q.C., and J. L. Morris, of the Canadian Bar (Jeune with them), for the respondents, contended that the Provincial Acts in question were all of them within the scope of Provincial legislative authority, and were valid and binding Acts. It is not the case that the powers of the Dominion and Provincial Legislatures are mutually exclusive. If this corporation, deriving its origin from the Canadian Parliament, had property in two Provinces, the Provincial Legislatures might annex separate incidents to that property. The Act impugned in this case is within sect. 92, sub.-ss. 7, 11, 18 of the Act of 1867; and, moreover, the subject of the Quebec Act 38 Vict. c. 64, was provincial, the domicile of the respondent corporation being in Montreal, and its funds invested in the Province of Quebec. If either Provincial Legislature was singly incompetent to repeal or amend a Canadian Act, yet the conjoint operation of both Legislatures was adequate for that purpose.

It was further contended that the appellant seceded from the Presbyterian Church of Canada in connection with the Church of Scotland, and by his secession ceased

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(1) 4 Hare, 572.

(2) De G. & S. 122.

(3) 7 Hare, 445, and on appeal 1 De G. M. & G. 86.

(4) 9 Cl. & F. 355.

(5) 3 Mer. 353, 409.



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to be a minister in connection therewith, and ceased to have any claim, or to be entitled to any share, of the fund in suit. The history and constitution of that Church are such that its Synod had full power to effect a union with the other three churches without destroying its identity. In 1844, its Synod passed an Act declaring its supreme and uncontrolled jurisdiction, discipline, and government in regard to all matters ecclesiastical and spiritual. The appellant assented to that Act by a formal instrument at the time of his ordination. He was therefore bound by the resolutions in favour of union, and being bound by the resolutions he was estopped from objecting to the validity of the statute which carried them into effect. There is evidence to shew that the Church remained the same both before and after the union, and that the Church of Scotland in Scotland recognized and approved the union. If the Church had a right to effect the union, the property followed, and the respondents could not be deprived thereof by doing a lawful thing in a lawful way. Moreover, the rights of persons entitled to beneficial interests in respect of the fund in question were unaffected by the union, or by the Provincial Acts. The claim of the appellant was merely to a certain payment out of the fund, and there was no allegation or evidence of a demand and refusal in respect of such claim.

Davey, Q.C., replied.

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The judgment of their Lordships was delivered by  
 LORD WATSON:—

The first question raised in this appeal is, whether the Legislature of the Province of Quebec had power, in the year 1875, to modify or repeal the enactments of a statute passed by the Parliament of the Province of Canada in the year 1858 (22 Vict. c. 66), intituled "An Act to

incorporate the Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland."

The Fund subject to the administration of the Board constituted by the Act of 1858 consisted of a capital sum of £127,448 5s. sterling, which was paid by the Government of Canada under the following circumstances: The ministers of the Presbyterian Church of Canada in connection with the Church of Scotland, were entitled, by virtue of certain Imperial statutes, to an endowment or annual subsidy out of the revenues derived from colonial lands, termed Clergy Reserves, and from moneys obtained by the sale of portions of these lands, supplemented, when necessary, from the exchequer of Great Britain. But this connection between the Presbyterian Church and the State was at length dissolved. In 1853, an Act was passed by the British Parliament (16 Vict. c. 21), authorizing the Legislature of the Province of Canada to dispose of the Clergy Reserves and investments arising from sales thereof, but reserving to the clergy the annual stipends then enjoyed by them, and that during the period of their natural lives or incumbencies. In 1855 the Legislature of Canada, in exercise of the power thus conferred, enacted that all union between Church and State should cease, and that those ministers who were admitted to office after the 9th of May, 1853, being the date of the Act 16 Vict. c. 21, should receive no allowance from the Government. It was, however, provided that the rights of ministers entitled, at that date, to participate in the State subsidy, should be reserved entire, power being given to the Governor-General in Council to commute the annual stipend payable to each individual so entitled to the capital value of such stipend, calculated at six per cent. on the probable life of the annuitant.

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All the ministers interested consented to accept the statutory terms of commutation, and agreed to bring the amounts severally payable to them into one common fund, to be settled for behoof of the Presbyterian Church of Canada in connection with the Church of Scotland. In accordance with resolutions unanimously adopted by the Church in Synod assembled on the 11th of January, 1855, they further agreed that the interest of the Fund should be devoted, in the first instance, to the payment of an annual stipend of £112 10s. to each commutor, and that the claim next in order of preference should be that of ministers then on the roll, who had been admitted since the 9th of May, 1853. The arrangement thus effected was carried out by eight commissioners duly appointed for that purpose, of whom three were ministers and five were laymen. They received payment of the commutation moneys, to the amount already stated; and in order to provide for the management of the Fund thus obtained, the Legislature of the Province of Canada, upon the application of the commissioners, passed the Act 22 Vict. c. 66.

By the first clause of the Act in question, the commissioners were, along with four additional members and their successors, declared to be a body politic and corporate by the name of the "Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland;" and the funds held by them as commissioners were vested in the Board "in trust for the said Church," subject to the condition that the annual interest thereof should remain chargeable with the stipends and allowances payable to the parties entitled thereto, in terms of the arrangement under which the Fund was contributed by the commutors. It was enacted that, at the first meeting of Synod held after the passing of the Act, three

commissioners, one minister and two laymen, should retire from the Board, and that seven new members, consisting of four ministers and three laymen, should be elected by the Synod. The Board thus reconstituted was composed of six ministers and six laymen, and it was provided that at each annual meeting of the Synod held thereafter two ministers and two laymen were to retire by rotation, and that four new members, two clerical and two lay, should be elected in their stead. It was expressly enacted that all members of the Board should also be members of the Presbyterian Church of Canada in connection with the Church of Scotland; and provision was made for filling up vacancies occasioned by the death or resignation of a member, by his removal from the Province of Canada, or by his leaving the communion of the said Church.

In the year 1874 serious proposals had been made for an incorporative union between the Presbyterian Church of Canada in connection with the Church of Scotland, the Canada Presbyterian Church, the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces. The old Parliament of the Province of Canada had by this time been abolished, and its legislative power had been distributed between the two Provincial Legislatures of Ontario and Quebec, and the new Parliament of the Dominion of Canada, under the provisions of the B. N. A. Act, 1867. With the view of facilitating the contemplated union of the Churches, an Act of the Legislature of Quebec was passed in February, 1875 (38 Vict. c. 62), in order to remove any obstruction which might arise from the form and designation of the several trusts or Acts of incorporation by which the property of the Churches was held and administered. By the 11th section of that Act it was provided that, in the

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event of union taking place, the members then constituting the Board for the management of the Temporalities Fund, under the Act of 1858, should remain in office, and pay over the revenue to the persons previously entitled to it; that any revenue not required for that purpose should pass to and be subject to the disposal of the united Church; and that any part of the Fund remaining after satisfying the claim of the last survivor of those entitled should belong to the Supreme Court of the united Church, and be applied to the aid of weak congregations. It was by the same clause enacted that vacancies occurring in the Temporalities Fund Board should not be filled up in the manner theretofore observed, but should be filled up in the manner provided by another Act of the Quebec Legislature.

The last-mentioned statute (38 Vict. c. 64), which received the assent of the Lieutenant-Governor in Council upon the same day as the preceding, was passed with the professed object of amending the Act of Parliament of the Province of Canada, 22 Vict. c. 66. It was thereby enacted that, from the time when the union was effected, the annual allowances to which they were previously entitled were to be continued by the Temporalities Board to ministers and probationers then on the roll of the Presbyterian Church of Canada in connection with the Church of Scotland, and these were to be paid, so far as necessary, out of the capital of the Fund, and that any surplus of revenue or capital, after satisfying these charges, should be at the disposal of the united Church. Ministers and probationers of the Church, interested in the Temporalities Fund, who might decline to become parties to the union, were, however, to retain all rights previously competent to them until the same lapsed or were extinguished. The constitution of the Board of Management was altered by the third and eighth clauses

of the Act. The third clause is in these terms:—"As often as any vacancy in the Board for the management of the said Temporalities Fund occurs, by death, resignation or otherwise, the beneficiaries entitled to the benefit of the said Fund may each nominate a person, being a minister, or member of the said united Church, or, in the event of there being more than one vacancy, then one person for each vacancy, and the remanent members of the said Board shall thereupon, from among the persons so nominated as aforesaid, elect the person or number of persons necessary to fill such vacancy or vacancies, selecting the person or persons who may be nominated by the largest number of beneficiaries, but, in the event of failure on the part of the beneficiaries to nominate as aforesaid, the remanent members of the Board shall fill up the vacancy or vacancies from among the ministers or members of the said united Church." The eighth clause enacts that the 3rd section shall continue in force until the number of beneficiaries is reduced below fifteen, upon which occurrence the Board is to be continued by the remanent members filling up vacancies from among the ministers or members of the united Church. By the 10th section it was declared that the Act should come into force as soon as a notice was published in the *Quebec Official Gazette* to the effect that the union had been consummated, and that the articles of union had been signed by the Moderators of the respective Churches.

On the 14th of June, 1875, the Synods of the four Churches met at Montreal, and in each a resolution was carried in favour of union. In the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland it was resolved, by a very large majority of its members, that the four Churches should be united, and form one Assembly, to be known as "The General Assembly of the Presbyterian Church in Canada," and that

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the united Church should possess the same authorities, rights, privileges and benefits to which the Presbyterian Church in Canada in connection with the Church of Scotland was then entitled, excepting such as had been reserved by Acts of Parliament. The minority, which consisted of the Appellant, the Rev. Robert Dobie, and nine other members, dissented from the action of the Synod, and protested that they, and those who might choose to adhere to them, remained and still constituted the Presbyterian Church of Canada in connection with the Church of Scotland.

On the 15th of June, 1875, the majority of the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, and the Synods of the other uniting Churches, met in General Assembly, when the Articles of Union were signed by the Moderators of each of the four Churches; and thereupon one of the Moderators, with the consent and concurrence of the rest, declared the four Churches to be united in one Church, represented by that its first General Assembly, to be designated and known as "The General Assembly of the Presbyterian Church in Canada." Notice of the union having been thus consummated was duly published in the *Quebec Official Gazette*.

After publication of the notice, the constitution of the Board for managing the Temporalities Fund was altered, and the Fund administered, in conformity with the provisions of the Quebec Act, 38 Vict. c. 64. In December, 1878, the Rev. Robert Dobie, who, with the other members of the protesting minority of 1875, and their adherents, maintains that they alone represent and constitute the Presbyterian Church of Canada in connection with the Church of Scotland, instituted, by petition to the Superior Court for Lower Canada, the proceedings in which the present appeal has been taken.

The leading conclusions of the petition are to have it adjudged and declared (1) that the Legislature of Quebec had no power to alter the Constitution of the Board or the purposes of the trust created by the Canadian Act, 22 Vict. c. 66, and consequently that the administration of the trust as carried on in terms of the Provincial Act of 1875 is illegal; (2) that the protesting minority of the Synod of 1875, and its adherents, are now the Presbyterian Church of Canada in connection with the Church of Scotland, and that certain ministers of the united Church, who were members of the majority, had, by reason of the union, forfeited all right to participate in the benefits of the Temporalities Fund; and (3) to have an injunction against the Board, as then constituted, acting in prejudice of the rights of the Appellant, and others beneficially interested in the statutory trust of 1858. On the 31st of December, 1878, the Appellant's application was heard before Mr. Justice Jetté, who made an order for summoning the Respondents, and also issued an interim injunction, which the learned Judge dissolved, after fully hearing both parties, on the 31st of December, 1879, and at the same time dismissed the Appellant's petition, with costs. This decision was, on appeal to the Court of Queen's Bench for Lower Canada, affirmed, in accordance with the opinions of the majority of the judges.

The judgments of Mr. Justice Jetté in the Court of first instance, and of Chief Justice Dorion and Mr. Justice Monk in the Court of Queen's Bench, are based exclusively upon the competency of the Quebec Legislature to pass the Act 38 Vict. c. 64, and the consequent validity of that statute. On the other hand, Mr. Justice Ramsay and Mr. Justice Tessier were of opinion that the Appellant was entitled to an injunction, on the ground that the Act 38 Vict. c. 64, was invalid, and that the

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majority of the Presbyterian Church of Canada in connection with the Church of Scotland had no power to communicate any interest in the Temporalities Fund of that Church to the religious bodies with whom they had chosen to unite themselves in 1875. Mr. Justice M'Cord was of opinion, with his brethren Ramsay and Tessier, JJ., that the Act of the Legislature of Quebec was *ultra vires*, but he held that the majority of the Presbyterian Church of Canada in connection with the Church of Scotland had undoubted power to admit into that Church, as members of it, the three religious bodies with whom they had entered into union. Consequently the learned Justice, though differing in opinion from his brethren Dorion, C. J., and Monk, J., agreed with them in result.

Whether the Legislature of Quebec had power to pass the Act 38 Vict. c. 64, is the question first requiring consideration, because, if it be answered in the affirmative, the case of the Appellant entirely fails. The determination of that question appears to their Lordships to depend upon the construction of certain clauses in the B. N. A. Act, 1867. There is no room, in the present case, for the application of those general principles of constitutional law which were discussed by some of the judges in the courts below, and which were founded on in argument at the bar. There is really no practical limit to the authority of a Supreme Legislature except the lack of executive power to enforce its enactments. But the Legislature of Quebec is not supreme; at all events, it can only assert its supremacy within those limits which have been assigned to it by the Act of 1867.

The Act of the Parliament of the Province of Canada, 22 Vict. c. 66, was, after the passing of the B. N. A. Act, 1867, continued in force within the Provinces of Ontario and Quebec, by virtue of section 129 of the

latter statute, which, *inter alia*, enacts that, except as therein provided, all laws in force in Canada at the time of the union thereby effected shall continue in Ontario and Quebec as if the union had not been made. But that enactment is qualified by the provision that all such laws, with the exception of those enacted by the Parliaments of Great Britain, or of the United Kingdom of Great Britain and Ireland, shall be subject "to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Province or of that Legislature under this Act." The powers conferred by this section upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of the Province of Canada, are made precisely co-extensive with the powers of direct legislation with which these bodies are invested by the other clauses of the Act of 1867. In order, therefore, to ascertain how far the Provincial Legislature of Quebec had power to alter and amend the Act of 1858, incorporating the Board for the management of the Temporalities Fund, it becomes necessary to revert to sections 91 and 92 of the B. N. A. Act, which enumerate and define the various matters which are within the exclusive legislative authority of the Parliament of Canada, as well as those in relation to which the Legislatures of the respective Provinces have the exclusive right of making laws. If it could be established that, in the absence of all previous legislation on the subject, the Legislature of Quebec would have been authorized by section 92 to pass an Act in terms identical with the 22 Vict. c. 66, then it would follow that the Act of the 22 Vict. has been validly amended by the 38 Vict. c. 64. On the other hand, if the Legislature of Quebec has not derived such power of enactment from section 92, the necessary inference is that the legislative authority

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required, in terms of section 129, to sustain its right to repeal or alter an old law of the Parliament of the Province of Canada, is in this case wanting, and that the Act 38 Vict. c. 64, was not *intra vires* of the Legislatures by which it was passed.

The general scheme of the B. N. A. Act, 1867, and, in particular, the general scope and effect of sections 91 and 92, have been so fully commented upon by this Board in the recent cases of the *Citizens Insurance Company of Canada v. Parsons*, and the *Queen Insurance Company v. Parsons* (1), that it is unnecessary to say anything further upon that subject. Their Lordships see no reason to modify in any respect the principles of law upon which they proceeded in deciding those cases; but in determining how far these principles apply to the present case, it is necessary to consider to what extent the circumstances of each case are identical or similar.

The case of the *Citizens Insurance Company of Canada v. Parsons* comes nearest in its circumstances to the present, as in that case the appellant company was incorporated by, and derived all its statutory rights and privileges from, an Act of the Province of Canada, whereas the Queen Insurance Company was incorporated under the provisions of the British Joint Stock Companies Act, 7 and 8 Vict. c. 110. In both cases the validity of an Act of the Legislature of Ontario was impeached on the ground that its provisions were *ultra vires* of a Provincial Legislature, and were not binding unless enacted by the Parliament of Canada. It was contended on behalf of the Citizens Insurance Company that the statute complained of was invalid in respect that it virtually repealed certain rights and privileges which they enjoyed by virtue of their Act of incorpora-

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(1) 7 App. Cas. 96; *ante*, p. 285.

tion. That contention was rejected, and the decision in that case would be a precedent fatal to the contention of the Appellant, if the provisions of the Ontario Act, 39 Vict. c. 31, and the Quebec Act, 38 Vict. c. 64, were of the same, or substantially the same, character. But upon an examination of these two statutes, it becomes at once apparent that there is a marked difference in the character of their respective enactments. The Ontario Act merely prescribed that certain conditions should attach to every policy, entered into or in force, for insuring property situate within the Province against the risk of fire. It dealt with all corporations, companies, and individuals alike who might choose to insure property in Ontario; it did not interfere with their constitution or *status*, but required that certain reasonable conditions should be held as inserted in every contract made by them. The Quebec Act, 38 Vict. c. 64, on the contrary, deals with a single statutory trust, and interferes directly with the constitution and privileges of a corporation created by an Act of the Province of Canada, and having its corporate existence and corporate rights in the Province of Ontario, as well as in the Province of Quebec. The professed object of the Act, and the effect of its provisions, is, not to impose conditions on the dealings of the corporation with its funds within the Province of Quebec, but to destroy, in the first place, the old corporation, and create a new one; and, in the second place, to alter materially the class of persons interested in the funds of the corporation.

According to the principles established by the judgment of this Board in the cases already referred to, the first step to be taken, with a view to test the validity of an Act of the Provincial Legislature, is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in section 92. If it does

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not, then the Act is of no validity. If it does, then these further questions may arise, viz., "Whether, notwithstanding that it is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the Provincial Legislature is or is not thereby overborne?"

Does, then, the Act 38 Vict. c. 64, fall within any of the classes enumerated in section 92, and thereby assigned to the Provincial Legislatures? Their Lordships are of opinion that it does not; and consequently that its enactments are invalid, and that the constitution and duties of the Board for managing the Temporalities Fund must still be regulated by the Act of 1858.

It was contended for the Respondents that the Quebec Act of 1875 is within one or more of these three classes of subjects enumerated in section 92—

"(7) The establishment, maintenance and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province other than marine hospitals."

"(11) The incorporation of companies with Provincial objects."

"(13) Property and civil rights in the Province."

The most plausible argument for the Respondent was founded upon the terms of Class (13), but it has failed to satisfy their Lordships that the statute impeached by the Appellant is a law in relation to property and civil rights within the Province of Quebec.

The Quebec Act of 1875 does not, as has already been pointed out, deal directly with property or contracts affecting property, but with the civil rights of a corporation, and of individuals, present or future, for whose benefit the corporation was created and exists. If these rights and interests were capable of division according to their local position in Ontario and Quebec respectively,

the Legislature of each Province would have power to deal with them so far as situate within the limits of its authority. If, by a single Act of the Dominion Parliament, there had been constituted two separate corporations for the purpose of working, the one a mine within the Province of Upper Canada, and the other a mine in the Province of Lower Canada, the Legislature of Quebec would clearly have had authority to repeal the Act so far as it related to the latter mine and the corporation by which it was worked.

The Quebec Act, 38 Vict. c. 64, does not profess to repeal and amend the Act of 1858, only in so far as its provisions may apply to or be operative within the Province of Quebec, and its enactments are apparently not framed with a view to any such limitation. The reason is obvious, and it is a reason which appears to their Lordships to be fatal to the validity of the Act. The corporation and the corporate trust, the matters to which its provisions relate, are in reality not divisible according to the limits of Provincial authority. In every case where an Act applicable to the two Provinces of Quebec and Ontario, can now be validly repealed by one of them, the result must be to leave the Act in full vigour within the other Province. But, in the present case, the legislation of Quebec must necessarily affect the rights and status of the corporation as previously existing in the Province of Ontario, as well as the rights and interests of individual corporators in that Province. In addition to that, the Fund administered by the Corporate Board, under the Act of 1858, is held in perpetuity for the benefit of the ministers and members of a Church having its local situation in both Provinces, and the proportion of the Fund and its revenues falling to either Province is uncertain and fluctuating, so that it would be impossible for the Legislature of Quebec to appropriate a definite share

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the united Church should possess the same authorities, rights, privileges and benefits to which the Presbyterian Church in Canada in connection with the Church of Scotland was then entitled, excepting such as had been reserved by Acts of Parliament. The minority, which consisted of the Appellant, the Rev. Robert Dobie, and nine other members, dissented from the action of the Synod, and protested that they, and those who might choose to adhere to them, remained and still constituted the Presbyterian Church of Canada in connection with the Church of Scotland.

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After publication of the notice, the constitution of the Board for managing the Temporalities Fund was altered, and the Fund administered, in conformity with the provisions of the Quebec Act, 38 Vict. c. 64. In December, 1878, the Rev. Robert Dobie, who, with the other members of the protesting minority of 1875, and their adherents, maintains that they alone represent and constitute the Presbyterian Church of Canada in connection with the Church of Scotland, instituted, by petition to the Superior Court for Lower Canada, the proceedings in which the present appeal has been taken.

The leading conclusions of the petition are to have it adjudged and declared (1) that the Legislature of Quebec had no power to alter the Constitution of the Board or the purposes of the trust created by the Canadian Act, 22 Vict. c. 66, and consequently that the administration of the trust as carried on in terms of the Provincial Act of 1875 is illegal; (2) that the protesting minority of the Synod of 1875, and its adherents, are now the Presbyterian Church of Canada in connection with the Church of Scotland, and that certain ministers of the united Church, who were members of the majority, had, by reason of the union, forfeited all right to participate in the benefits of the Temporalities Fund; and (3) to have an injunction against the Board, as then constituted, acting in prejudice of the rights of the Appellant, and others beneficially interested in the statutory trust of 1858. On the 31st of December, 1878, the Appellant's application was heard before Mr. Justice Jetté, who made an order for summoning the Respondents, and also issued an interim injunction, which the learned Judge dissolved, after fully hearing both parties, on the 31st of December, 1879, and at the same time dismissed the Appellant's petition, with costs. This decision was, on appeal to the Court of Queen's Bench for Lower Canada, affirmed, in accordance with the opinions of the majority of the judges.

The judgments of Mr. Justice Jetté in the Court of first instance, and of Chief Justice Dorion and Mr. Justice Monk in the Court of Queen's Bench, are based exclusively upon the competency of the Quebec Legislature to pass the Act 38 Vict. c. 64, and the consequent validity of that statute. On the other hand, Mr. Justice Ramsay and Mr. Justice Tessier were of opinion that the Appellant was entitled to an injunction, on the ground that the Act 38 Vict. c. 64, was invalid, and that the

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On the assumption that the Legislature of Quebec had not power to alter the provisions of the Act 22 Vict. c. 66, the Respondents still maintain that the Appellant cannot prevail in the present action, in respect that he has not sufficient interest to entitle him to sue, and that, even if he has such interest, he is barred from challenging the Act of 1875 by the resolutions of the majority of the Synod, which are said to be binding upon him.

As regards the first of these objections, it is true that the Appellant's right to an annuity from the Temporalities Fund is reserved in its integrity by the Act which he impugns, and his own pecuniary interests are, therefore, not affected by its provisions. But the Appellant is not a mere annuitant, and his right to an annual allowance does not constitute his only connection with the Fund. He is likewise one of the commutators,—one of the persons by whom the Fund was contributed for the purposes of the Act 22 Vict. c. 66,—and in that capacity he has a plain interest, and consequent right, to insist that the Fund shall be administered in strict accordance with law.

The second objection is derived from the resolutions in favour of union carried by the majority of the Synod of the Presbyterian Church of Canada, in connection with the Church of Scotland, upon the 14th of June, 1875. The Quebec Act 38 Vict. c. 64, deals with the Temporalities Fund in conformity with these resolutions; and it is the contention of the Respondents that the Appellant is bound by the resolutions, and cannot, therefore, impeach the statute which gives effect to them. That is a startling proposition. If the Legislature of Quebec was incompetent to enact the statute of 1875, it is not easy to understand how the Synod could have power, either directly or indirectly, to validate that Act, or to set aside the enactments of 22 Vict. c. 66. The Respondents do not, indeed, allege that the Synod was

possessed of legislative powers, but they assert that the majority, by resolving that the Fund, settled under the Act 22 Vict. c. 66, should in future be administered according to a scheme inconsistent with the provisions of that Act, bound all its members to acquiesce in that new course of administration, and to abstain from enforcing the statute law of the land. It may be doubted whether a court of law would sustain such an obligation, even if it were expressly undertaken; but it is unnecessary to discuss that point, because their Lordships are of opinion that the Respondents have failed to establish that the Appellant, as a member of the Presbyterian Church in connection with the Church of Scotland, undertook any obligation to that effect.

Whether the Appellant is bound, as alleged by the Respondents, is, in this case, a question relating exclusively to civil rights, and must, therefore, be dealt with as matter of contract between him and the Synod or Church of which he was admittedly a member at the time when the resolutions in favour of union were carried. In the case of a non-established Presbyterian Church, its constitution, or in other words the terms of the contract under which its members are associated, are rarely embodied in a single document, and must, in part at least, be gathered from the proceedings and practice of its judicatories. Every person who becomes a member of a Church so constituted must be held to have satisfied himself in regard to the proceedings and practice of its courts, and to have agreed to submit to the precedents which these establish. The Respondents were, therefore, justified in referring to the minutes of the Synod from 1831 to 1875, for the purpose of shewing the extent of the power vested in majorities by the constitution of the Church. The minutes, which were founded upon by counsel for the Respondents, afford abundant evidence to the

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effect that, in all matters which the Synod was competent to deal with and determine, the will of the majority, as expressed by their vote, was binding upon every member of the Synod, a proposition which the Appellant did not dispute. But they contain nothing whatever to shew that, in cases where the administration of Church property was regulated by statute, the Synod ever asserted its right to set aside that legal course of administration, and to restrain dissentient members from challenging any departure from it.

Their Lordships are, therefore, of opinion that the Appellant is entitled to have it declared that, notwithstanding the provisions of the Quebec Act of 1875, the constitution of the Board and the administration of the Temporalities Fund are still governed by the Canadian Act of 1858, and that the Respondent Board is not duly constituted in terms of that Act; and also to have an injunction restraining the Respondents from paying away or otherwise disposing of either the principal or income of the Fund.

The Appellant, in his application to the Court below, asks a declaration to the effect that the Fund in question is held by the Respondents, "in trust, for the benefit of the Presbyterian Church of Canada in connection with the Church of Scotland, and for the benefit of the ministers and missionaries who retain their connection therewith, and who have not ceased to be ministers thereof, and for no other purpose whatever." It is obviously inexpedient to make any declaration of that kind. It would be a mere repetition of the language of the Act of 1858, by which the trust is regulated, and would decide nothing as between the parties to the present suit.

The Appellant also seeks to have it declared that six reverend gentlemen who, at and prior to the union of

1875, were members of the Presbyterian Church of Canada in connection with the Church of Scotland, have ceased to possess that character, and that they have no right to the benefits of the Temporalities Fund; and he concludes for an injunction against the Respondent corporation making any payment to them. Their Lordships are of opinion that these are matters which cannot be completely decided in the present action. Their decision depends upon the answer to be given to the question, which Church or aggregate of Churches is now to be considered as being or representing the Presbyterian Church of Canada in connection with the Church of Scotland, within the meaning of the Act 22 Vict. c. 66? But the two Churches which appear from the record to have rival claims to that position are not represented in this action; and of the six ministers whose pecuniary interests are assailed by the Appellant, he has only called one, the Rev. Dr. Cook, as a Respondent. That question between the Churches must be determined somehow before a constitutional Board can be elected; and, unless the Dominion Parliament intervenes, there will be ample opportunity for new and protracted litigation. It cannot be determined now, because the Appellant has not asked any order from the Court in regard to the formation of the new Board, and has not made the individuals and religious bodies interested, parties to this cause.

Substantial success being with the Appellant, he must have his costs as against the Respondents. But their Lordships are of opinion that neither the Respondents' own costs, nor those in which they are found liable to the Appellant, ought to come out of the Trust Fund, which they are holding and administering without legal title. The Appellant's costs must therefore be paid by the members of the Respondent corporation as individuals.

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Their Lordships will, accordingly, humbly advise Her Majesty that the judgments under appeal ought to be reversed, and that the cause should be remitted to the Court of Queen's Bench, Lower Canada, with directions to that court to give effect to the declarations recommended by this Board, and also to issue in the Appellant's favour an injunction and decree for costs, as directed by this Board.

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JUDGMENTS IN COURT OF QUEEN'S BENCH (*on appeal from the judgment of the Superior Court (Jetté, J.), post, p. 393.*)

[*Reported 3 L. N. 244.*]

RAMSAY, J. :—

The whole point of this case has been most ably put by the learned judge in the court below, and the issue is really brought down to this : whether certain Acts of the Quebec Legislature are within the legislative powers of that body.

The examination of the questions as to the extent of the legislative powers of the General and Local Legislatures frequently gives rise to great difficulty, and the decisions are not as yet sufficiently numerous to enable the courts to derive from them any well-settled general principles as a guide. It is, therefore, with some hesitation that I approach the consideration of these intricate questions, to some of which it is impossible to give a totally satisfactory answer. The double enumeration by which it was intended to obviate all doubt as to which Legislature was to possess exclusively this or that power, even the use of the word "exclusively" has complicated the difficulty, and given rise to interpretations of very various merit. The questions presented in the case before us appear to me to be more difficult of solution than any that have as yet come before us, as they involve the consideration of a direct conflict between sections 91 and 92 of the B. N. A. Act.

Briefly stated, the facts are these : Prior to 1875, there existed a religious body known as the Presbyterian Church of Canada in connection with the Church of Scotland. It did not owe its existence to any charter or statute, but it grew out of the settlement in this country of Presbyterians in communion with the Church of Scotland. But if no statute defined precisely the limits, rights and privileges of this body, numerous statutes acknowledged its

existence, and the right of its clergy to share in the lands known as the "Clergy Reserves" was admitted. When, by process of legislation, the share of the clergy of the Church of Scotland in Canada became fixed, an Act of the Legislature of United Canada was obtained (22 Vict. c. 66) to make provision for the management and holding of certain funds of the Presbyterian Church in connection with the Church of Scotland, "now held in trust by certain commissioners, hereinafter named, and for the benefit thereof, and also of such other funds as may from time to time be granted, given, bequeathed, or contributed thereto." The body so incorporated is the Board of Management, the present Respondent.

This Act being still in force, in 1874 numerous clergymen and others, members of different Presbyterian Churches in Canada, deemed it desirable to unite their ecclesiastical fortunes and henceforward to form one body, to be called "The Presbyterian Church in Canada." Nothing could be more lawful or more praiseworthy than the attempt to sink minor differences of opinion in order to attain greater efficiency. But we have not to decide as to motives and intentions; our duty is deliberately and coldly to decide a question of law. Application was made almost simultaneously to the Legislatures of Ontario and Quebec for authority to give effect to this determination, and to enable the new body to deal with the property of the Churches so united. An Act of the Ontario Legislature (38 Vict. c. 75) was passed, the preamble of which sets up that:

"Whereas the Canada Presbyterian Church, the Presbyterian Church of Canada in connection with the Church of Scotland, the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces, have severally agreed to unite together and form one body or denomination of Christians, under the name of 'The Presbyterian Church in Canada;' and the Moderators of the General Assembly of the Canada Presbyterian Church, and of the Synods of the Presbyterian Church of Canada in connection with the Church of Scotland, and the Church of the Maritime Provinces in connection with the Church of Scotland, and the Presbyterian Church of the Lower Provinces, respectively, by and with the consent of the said General Assembly and Synods, have by their petitions, stating such agreement to unite as aforesaid, prayed that for the furtherance of this their purpose, and to remove any obstructions to such union which may arise out of the present form and designation of the

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several Trusts or Acts of incorporation by which the property of the said Churches, and of the colleges and congregations connected with the said Churches, or any of them respectively, are held and administered or otherwise, certain legislative provisions may be made in reference to the property of the said Churches, colleges and congregations, situate within the Province of Ontario, and other matters affecting the same in view of the said union."

The first section then vests all the property of the different Churches so united in the united body under the name of "The Presbyterian Church in Canada." Then come reservations and modifications of certain rights, and then by section 4 certain legislation in Ontario respecting the property of religious institutions is made applicable to the various congregations in Ontario in communion with the Presbyterian Church in Canada. Section 5 declares that all the property, real and personal, belonging to or held in trust for the use of any college or educational or other institution, or for any trust in connection with any of the said Churches or religious bodies, either generally or for any special purpose or object, shall, from the time the said contemplated union takes place, and thenceforth, belong to and be held in trust for and to the use in like manner of "The Presbyterian Church in Canada." Section 7 then deals specially with Knox College and Queen's College, situate in Ontario, and with "The Presbyterian College" and with "Morin College," situate in the Province of Quebec. Section 8 deals with the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland, "administered by a Board incorporated by statute of the heretofore Provinces of Canada." Section 9 deals with the Widows' and Orphans' Fund of "The Canada Presbyterian Church" and "The Presbyterian Church of Canada in connection with the Church of Scotland." Section 10 authorizes the new body to take gifts, devises and bequests; and lastly, section 11 declares that "the union of the said churches shall be held to take place so soon as the Articles of the said union shall have been signed by the Moderators of the said respective Churches."

The legislation in the Province of Quebec took the form of two Acts, 38 Vict. co. 62 and 64, the former respecting the union of certain Presbyterian Churches; the latter is styled "An Act to amend the Act intituled 'An Act to incorporate the Board of Management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland.'"

Cap. 62 of the 38 Vict., Quebec, with the exception of the section relating to the Temporalities Fund, is substantially the same as the Ontario Act, 38 Vict. c. 75. One or two differences it may, however, be well at once to note. The Ontario Act bestows all the above-mentioned privileges on "The Presbyterian Church in Canada;" while the Act of Quebec bestows them on the body so named, "or any other name the said Church may adopt." The Quebec Act declares that the union of the four Churches is to take place from the publication of a notice in the *Quebec Gazette* to the effect that the Articles of Union have been signed by the Moderators of the said respective Churches. The Quebec Act has also a section which, harmless in itself, is suggestive of the utmost confusion of ideas. It is as follows: "In so far as it has authority to do so, the Legislature of the Province of Quebec hereby authorizes the Dominion Legislature, and the several Legislatures of the other Provinces, to pass such laws as will recognise and approve of such union throughout and within their respective jurisdictions."

The other of the Acts of Quebec can hardly be called an amendment of the former Act of the old Province of Canada, for it transfers almost the whole of the Temporalities Fund over to the new Church, and confides its management to a Board constituted in a manner entirely different from the Board under the old Act.

The condition of union in Ontario was accomplished, and the notice has appeared in the *Quebec Official Gazette*.

The Appellant, a minister of the Presbyterian Church in Canada in connection with the Church of Scotland, refused to concur in this fusion, and he petitioned for an injunction to prohibit the Board as now constituted from dealing with the Temporalities Fund. The Court below has dissolved the injunction; hence this appeal.

The statement in Respondent's factum, "that the petitioner and the seven ministers who continue with him outside the said union, have no right to continue the said Presbyterian Church of Canada in connection with the Church of Scotland, and that in fact they are dissentients, voluntarily separated from the said charge," is calculated to mislead. Whatever the legal effect of the proceedings may be, whole congregations have voluntarily separated themselves from the said Church, if the eight ministers have. But whether the non-conformists be 8 or 8,000 is of no importance, except for the purpose of sensation. The rights of the few are as sacred in the eye of the law as the rights of the many.

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A theological argument originally complicated the issues in the case; but the learned judge in the court below, very properly, I think, dismissed it from his consideration. If we were to admit such a line of discussion, we might be called upon to decide whether "The Presbyterian Church in Canada in connection with the Church of Scotland" was or is an orthodox body. This mode of circumscribing the argument evidently wounds the sensibilities of the Respondents, who perhaps would be as much shocked at the idea of a majority vote absorbing their new union into the Church of Rome, as the Rev. Mr. Dobie is at the metamorphosis which Respondents contend has now taken place; and therefore during the argument at the bar we were informed that the Church of Scotland had sanctioned or approved of the fusion in question. I only refer to this to shew in what inextricable difficulties we should be involved if we were to allow ourselves to be decoyed from the legal question, to the consideration of questions the interest of which cannot be over-estimated, but which are not of our competence. I do not conceive I have the mission to pronounce as to whether the "theological standards" of the four Churches are identical or not, and perhaps I may be permitted to add that I do not regret not having to perform that duty. I take it we must recognise the *status* of each of these churches, and also that they were separate and distinct bodies, however thin the partition may be which divided them, and we must also recognise the new body as one distinct from all the others.

As a fact, it is admitted that all the property and money of the Temporalities Fund is situated or invested in the Province of Quebec. The Respondents, relying on sub-section 13 of section 92, B. N. A. Act, which gives legislative power to the Provincial Legislatures over "property and civil rights in the Province," contend that having full control over all property, the Legislature of Quebec has full power to deal with all property which may exist in the Province of Quebec, and consequently that it has the power to confiscate the funds of the Presbyterian body situate in the Province of Quebec, and present them to some one else, and that this has been done. On the other hand, Appellant contends that the Local Legislature has no right to incorporate any companies but those having Provincial objects (*Ib.* sub-section 11); that this is tantamount to saying that the right to incorporate companies with other than local objects is exclusively reserved to the Dominion Parliament (sect. 91, B. N. A. Act); that the Board of Manage-

ment was an incorporation for other than Provincial objects, and therefore that it could not have been created a corporate body by a local Act, and consequently that its Act of incorporation cannot be altered or amended by any Local Legislature.

I must confess that the sections upon which the contending parties rely appear to me to be irreconcilable by themselves. If the local power to legislate over property and civil rights in the Province is to be interpreted to mean over "all" property, etc., then the power of Parliament to incorporate is illusory. In practice it never has been contended that property means all property. Railway companies incorporated by Parliament, for instance, hold and manage their property under Dominion laws, and such companies evict people from their private property in each Province under Dominion laws. No one will venture to affirm that a local Act could confiscate the property of a railway company incorporated by Parliament, or transfer it to another company or person. And so it has been decided in the case of *Bourgoin v. The Q., M., O. & O. Railway Company*, by the Privy Council (1), that a railway with all its appurtenances, and all the property, liabilities, rights and powers of the existing company, could not be conveyed to the Quebec Government, and, through it, to a company with a new title and a different organization, without legislative authority, and that if the railway was a Federal railway, the Act authorizing the transfer must be an Act of the Parliament of Canada. Nor, by parity of reasoning, could the Local Legislature confiscate the surplus funds of a bank on the pretext that it was property in the Province. It is impossible to conceive more obvious limitations to the right to legislate as to property than these. Again, we have had two decisions limiting the sub-section in question. In the case of *Evans v. Hudon* (2), Mr. Justice Rainville held that a local Act was unconstitutional which authorized the seizure by process of law of the salaries of Federal officers; and the Court of Appeal in Ontario, in the case of *Leprohon v. The Corporation of Ottawa* (3), held, reversing the judgment of the Queen's Bench (4), that under the B. N. A. Act, 1867, a Provincial Legislature has no power to impose a tax upon the official income of an officer of the Dominion Government, or to confer such a power on the municipalities. These decisions can only be sustained on the ground that property in the sub-section in question does not include such property and civil rights as are

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(1) 5 App. Cas. 381; *ante*, p. 233.

(2) 22 L.C.J. 268.

(3) 2 Ont. App. 522.

(4) 40 U. C. Q. B. 478.

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necessary to the existence of a Dominion object, to copy the phraseology of the B. N. A. Act. It may, perhaps, be said that sec. 91, sub-section 8, B. N. A. Act, specially gives to the Federal Parliament the power of fixing the salaries; but this does not seem to me to affect the question. After the salary has been fixed and is possessed by the individual, it becomes property in the Province. We are, therefore, obliged to sustain the judgment on some other general principle which limits the effect of sub-section 13, sec. 92, B. N. A. Act.

On the other hand, we have a decision of Vice-Chancellor Blake, in the case of *Cowan v. Wright* (1), upholding the constitutionality of the Ontario Act 38 Vict. c. 75, except in so far as it attempted to deal with property in the Province of Quebec. This is of course a decision of the precise point before us, and therefore it becomes important to examine the grounds upon which it was rendered. It appears to me that it is undeniable that the Local Legislature, acting within the scope of its powers, has a right to legislate as absolute as the Dominion Parliament legislating within the scope of its powers. Indeed, this doctrine as to the respective powers of the Dominion and Local Legislatures seems to me to be almost the only one on which there has been entire unanimity of opinion. But when from this it is sought to glide to the conclusion that the words of section 92 are alone to be considered as defining the exclusive rights of the Local Legislatures, I think we arrive at a doctrine opposed to positive law, and to the authority not only of the courts, but to the authority of practice.

There is a sort of floating notion that by the conjoint action of different Legislatures, the incapacity of a Local Legislature to pass an Act may be in some sort extended. Section 15 of the 38 Vict. c. 62 (Quebec), seems to have been added under the influence of such an idea. By it the Dominion and Local Legislatures are permitted to recognise and approve. I cannot understand anything more clear than this, that the Local Legislatures, by corresponding legislation, cannot in any degree enlarge the scope of their powers. When the question is between the authority of Parliament and that of a Local Legislature, the forbearing to legislate in a particular direction by Parliament may leave the field of local legislation more unlimited. This is the only bearing I can conceive the case of the *Union St. Jacques v. Belisle* (2) can have on this case. What the

(1) 23 Grant, 616.

(2) L. R. 6 P. C. 31; *ante*, p. 63.

Privy Council held in that case was that a special Act for the relief of a corporate body did not fall within the meaning of "Bankruptcy and Insolvency" (B. N. A. Act, sec. 91, sub-sec. 21), and this more particularly as there was no Dominion Act with which it interfered. It is, therefore, dead against the pretension of Respondents in this case, for the legislation objected to upsets a Dominion Act, that is to say, if corporations which have not alone Provincial objects (Provincial according to the meaning of the B. N. A. Act, i.e., relating to one Province under the Act) created before Confederation, are under Dominion laws. On this point there has never been a doubt. For instance, the Acts of incorporation of the G. T. Railway, an old Province of Canada incorporation, have been amended by Dominion Acts, never by local ones.

Another authority in support of the constitutionality of the Ontario Act has been mentioned by Mr. Todd in his very valuable volume on Parliamentary Government in the British Colonies, p. 355. This is of course an authority not to be despised, and if it had been given free from all bias by political considerations, I should have considered it a very valuable opinion. But, without meaning to imply any sort of criticism as to the exercise of the discretion of the Federal Government in the disallowance of bills, I may say that we all know that the Federal Government is most unwilling to interfere in a too trenchant manner with local legislation; and where there is room for doubt as to the limits of the powers exercised, and where great popular interests are involved, they readily leave the question to the decision of the courts. The report referred to by Mr. Todd, therefore, amounts to little more than this, that where part of an Act is evidently *ultra vires*, and the rest not evidently so, the Federal Government will not interfere and disallow the bill. I have already said that the terms of section 92 of the B. N. A. Act do not alone decide as to the limit of the local legislative power. Those who drew the B. N. A. Act saw that, in spite of all precautions, it would be impossible so to define the exclusive powers as to avoid clashing. It was therefore enacted at the end of section 91, as a rule of interpretation, that "any matter coming within any of the classes of subjects enumerated in this section, shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." This appears to me to be decisive in the present case, and I feel myself compelled to come to the conclusion

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that an Act which disposes of the property of a corporation created by a Federal law is unconstitutional.

There is another way of considering the matter, which appears to me to bring forward this view still more clearly. If the Presbyterian body all over Canada wanted an Act of incorporation to enable them to manage their property, no local legislation would suffice. This brings me to still another consideration. The Ontario Act and the 38 Vict. c. 62 (Quebec), are Acts of incorporation to all intents and purposes. It is true they do not, in so many words, declare certain persons to be a body corporate, but each gives to a certain organization corporate powers; each creates a fictitious person able to receive and hold by gift and devise. It will scarcely be pretended that these two Acts have created but one body corporate. They have evidently created two corporations, each of which deals with Presbyterians all over Canada. Now, let us apply the rule of *ultra vires* laid down in the Minute of Council mentioned by Mr. Todd. It was there said the Act of Ontario was *ultra vires* in so far as it dealt with property in the Province of Quebec. Is it not by parity of reasoning also *ultra vires* in so far as it deals with civil rights outside the Province? If so, then c. 62 is equally void so far. And what is the result? The Ontario Act not having been disallowed, exists so far as it can be applied within the local jurisdiction—that is, it has incorporated the Presbyterians in Ontario, under the name of “The Presbyterian Church in Canada.” The Quebec statute has incorporated the Presbyterians of Quebec under the name of “The Presbyterian Church in Canada,” “or any other name the said Church may adopt,” and it is in favour of this unnamed corporation, and not in favour of the Ontario body, it has confiscated the property of “The Presbyterian Church of Canada in connection with the Church of Scotland.” This mode of executive morselling would have the effect of producing a result which no Legislature contemplated. If a donor directs that £5 apiece be given to ten persons, it may logically be assumed that to give £1 apiece to each is partly to fulfil his directions; but to give the whole fifty pounds to one of the ten persons is to contravene his directions. Therefore, to let a law stand which is partly *ultra vires* and partly constitutional, may be the most perfect mode of defeating the legislative will. I therefore say that a law which is *ultra vires* in part may thereby be *ultra vires* in whole, and so it should be construed—at all events when it appears that the object of the Act is not attained

by a partial execution. Take for instance an Act of incorporation of a railway company from Quebec to Toronto. Could that be interpreted as an Act of incorporation from Quebec to the Province line? Unquestionably it could not be. But I shall be told "there is a special exception for that" (sec. 92, sub-sec. 10, a). The exception is not, however, more formal than the exception from incorporation by local Act of companies having other than Provincial objects. I therefore think that the Act purporting to create the body to be benefited by the transfer of the Temporalities Fund is *ultra vires* in whole.

I would therefore reverse, and Mr. Justice Tessier, I understand, concurs in the conclusion at which I have arrived.

McCord, J.:—

It is unnecessary for me to state the facts of this case; they are fully set forth in the printed remarks of the learned judge who rendered the judgment appealed from. As to the law of the case, resulting from those facts, I am of opinion that the Quebec Act, 38 Vict. c. 64, in so far as it alters the constitution, composition and succession of the Board for the management of the Temporalities Fund, is *ultra vires*.

The Board in question is a corporation created by the statute of the late Province of Canada (now the Provinces of Quebec and Ontario), 22 Vict. c. 66. It was created for the management of a fund derived from, and existing in, both Ontario and Quebec, and belonging to a Church the territorial limits of which embraced both Provinces, and the government or synodical management of which was not carried on in one Province only, but in both. This corporation was not created for a "Provincial (Quebec or Ontario) object," nor has it a Provincial character. On the contrary, it was created in the interest and for the advantage of both Provinces. Being created for two Provinces, and applicable to them both, it can only be altered by a Parliament having power to legislate for these two Provinces. The character or scope of this corporation could not cease or change by reason of the Fund happening at any time to be invested wholly in one of the Provinces, and of the place of business of the corporation being at that time within that Province. The Board could at any time remove its investments and its place of business to the other Province, and its powers of management were in nowise confined to either Province. The corporation is not a mere accessory of the property which it has to administer;

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and though the Provincial Legislature may control the "property" within its limits, and even the "rights" of the corporation in connection with that property, yet it cannot alter the corporation itself. If the legislative control of the property carried with it the power to alter the corporation, the consequence would be that if, as may be the case at any future time, one portion of the Fund was invested in Ontario and the other in Quebec, one Provincial Legislature could enact that the corporation should be composed of one set of persons, and the other Legislature could ordain that it should consist of another set of members, and the absurd conclusion would be that there could be two Boards of Management. It seems to me, therefore, that the provisions of the Act 22 Vict. c. 66, respecting the composition and formation of the Board, have not been set aside by the Quebec Act 38 Vict. c. 64, and are still in force, for it is evident that they could not be set aside by the mere action of the Synod.

[So much of the judgment as relates to the power to effect a union without legislation, and as to the *locus standi* of the Appellant, is omitted.]

DORION, C.J. \* :—

This is an extremely important case, in which the Appellant, by means of a writ of injunction, contests the right of the Respondents to the management of a large amount of property. It involves one of the most intricate questions arising out of the distribution, under the B. N. A. Act, 1867, of the legislative powers attributed to the Dominion Parliament and the Local or Provincial Legislatures respectively.

It is not surprising that difficulties of this kind are recurring very frequently under our Constitutional Act. I consider, however, that the Act is as clear as it could be made, to embrace so many questions in a small compass. The principal question presented in this case resolves itself into this. A certain society was incorporated under an Act of the old united Province of Canada, 22 Vict. c. 66, and this society merged itself into a body embracing several Churches of like doctrine. The important inquiry is whether it was the Legislature of the Dominion or of Quebec that had authority to legislate on this question. The society was incorporated by an Act of the united Legislature of Upper and Lower Canada, and the question

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\* The report of the judgment of Chief Justice Dorion, in 3 L. N. 244, is imperfect. The report here given is from Doutre on the Constitution of Canada, p. 258.

submitted to the Court is as to whether the Legislature of the Province of Quebec has the power to amend, as regards that Province, an Act passed by the Parliament of the late Province of Canada—that is, of the then united Province of Upper and Lower Canada—entitled “An Act to incorporate the Board of Management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland.” It is strictly a question of law to be determined by the provisions of the B. N. A. Act, 1867.

The purpose of the amended Act, as its title indicates, was to incorporate a religious body for the management of the temporalities of their Church, and that of the amending Acts, 38 Vict. cc. 62 and 64, was to sanction the union effected by the body so incorporated with three other religious bodies, and to merge into one fund the property which belonged to them respectively at the time of their union, or which they may hereafter acquire; and to manage it in furtherance of the object of their institution.

It is contended on behalf of the Appellant that the original Act of incorporation having been passed by the Parliament of the late Province of Canada—now constituting the Provinces of Ontario and Quebec—and its provisions extending to the two Provinces, this original Act is beyond the control of the Legislatures of these Provinces acting separately; that the Legislature of Quebec could not touch an Act of the old Legislature affecting both Provinces; that is to say, that an Act not Provincial in its object, passed before Confederation, cannot be touched except by an Act of the Dominion Parliament. But was it not the fact that every day the Local Legislature was repealing whole bodies of laws affecting both Provinces, which had been passed before the division of the old Province into Quebec and Ontario? To go no further than a case in this court in February last, *McOlanaghan v. The St. Ann's Mutual Building Society* (1), it was clearly intimated that the Dominion Legislature had no right to legislate for the winding up of a building society incorporated by an Act of the Parliament of Canada, this being a matter affecting property in Lower Canada, and that it must be done by an Act of the Local Legislature. In the present case, a majority of twenty to one resolved that it would be beneficial to them to join with three other bodies whose differences are more in name than in substance. This body happened to have funds, the object of which was to pay ministers. They had

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(1) 24 L. C. J. 162; 3 L. N. 61.



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funds in Lower Canada and they wanted authority to manage that fund, so as not to be interfered with by any member of the corporation. The Local Legislature incorporated them and gave them the right to manage their property in this Province. But it was said, that is spoliation. That question was decided by the Privy Council in the case of *Union St. Jacques v. Belisle*. The Union was unable to pay the stipulated annuities to members, and it got authority from the Local Legislature to commute the payments for a fixed sum. The question was raised whether the Province of Quebec could interfere with vested rights, and the Privy Council maintained the validity of the local Act. Here the Legislature merely said to Mr. Dobie, if you don't wish to do as the others have done, your rights shall not be interfered with. If you don't join them, you shall not be deprived of any right. The Legislature of Quebec did not touch any rights which Mr. Dobie might have in the Province of Ontario; if they had done so, it would have been a dead letter. But they expressly limited themselves to the property within this Province.

By section 92 of the B. N. A. Act, 1867, the legislative powers conferred exclusively upon the Local Legislatures are defined, and among them are to be found, at sub-sec. 11, "The incorporation of companies with Provincial objects;" at sub-sec. 13, "Property and civil rights in the Province;" and at sub-sec. 16, "Generally all matters of a merely local or private nature in the Province."

An Act incorporating a religious body for the purpose of acquiring property, and of managing it for the support of their ministers, and of educating young men for the ministry, is undoubtedly an Act conferring a civil right, by giving to the body so incorporated a civil status which it had not before. When the powers imparted by such incorporation apply to one Province only, the incorporation is for Provincial purposes, and its franchises can only be conferred by the Legislature of the Province where those franchises are to be exercised, and not by the Dominion Parliament. As regards the other Provinces of the Dominion, such a corporation has no rights in such other Provinces other than those which, according to the laws in force in each Province, may be exercised by any foreign corporation.

A religious body so incorporated in one Province might, however, wish to extend its operations and seek to obtain the same corporate rights in one or more of the other Provinces; and, it can hardly be contested, each Local Legislature would have the

same power to grant to a body already incorporated in one Province the same franchises to be exercised within the limits of its own jurisdiction—and all the Local Legislatures might successively do the same. These corporate rights would not cease to be civil rights, nor to have Provincial objects, for having been successively granted in more than one of the Provinces of the Dominion; and the Dominion Parliament could not, therefore, claim to interfere and grant to a society incorporated in Quebec the same corporate rights in Ontario, under the pretence that the society being already incorporated in Quebec, its operations would extend to more than one Province by the new Act of incorporation; nor could the Dominion Parliament assume on the same ground to repeal or amend an Act incorporating a society in one Province, with a view to extend its repealed or amended provisions to two or more of the Provinces. There is no power given by the Confederation Act to the Dominion Parliament to amend or repeal an Act passed by a Local Legislature within the limits of its authority, and there is no concurrent authority conferred in this matter upon the Dominion Parliament and the Provincial Legislatures. If, therefore, the Local Legislature has the right to incorporate a church society, and confer upon such society corporate rights and franchises within its own Province, this right is exclusive, and cannot be exercised by the Dominion Parliament, for it is not one of the classes of subjects mentioned in sect. 92 of the Confederation Act, whereby a concurrent power of legislation is allowed in certain special matters to both the Dominion Parliament and the Local Legislatures.

If the right to incorporate a religious society, such as the one concerned in this case, belongs to the Local Legislatures when the incorporation takes place successively in the different Provinces, it is clear that the several Legislatures may impose different conditions on the incorporated body, or may even refuse an Act of incorporation altogether. Let us suppose that separate charters with different conditions were granted in several of the Provinces and refused in the others, on what ground could the Parliament of Canada interfere to make the same provisions for every Province, or even to impose such a corporation on the Provinces which might have already rejected it?

The B. N. A. Act was passed for the very purpose of allowing each Province to regulate its own internal affairs—including civil rights and incorporations for Provincial objects—without interference on the part of the representatives of the other Provinces

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through the Dominion Parliament. It would be a mere evasion of the plain tenor and object of the Act to say that the Dominion Parliament could interfere in matters purely Provincial merely because two or more of the Local Legislatures had adopted the same legislation, or, what would be more obnoxious, because they had refused to do so. It has been held, I believe without a dissenting voice, that the Dominion Parliament could not grant to the Orange Society an Act of incorporation with franchises applying to the whole Dominion, and that the Local Legislatures could alone create such a corporation for their several Provinces respectively, and bills have accordingly been introduced for that purpose, and discussed in the Local Legislature of Ontario during several successive sessions. This shews that what are civil rights and Provincial objects is not to be determined by the extent of territory to which interested parties may wish to apply legislative action, but by the character of such rights and objects.

But it is contended that the Imperial Parliament having expressly excluded, by sub-sect. 10 of sect. 92 of the Confederation Act, from the jurisdiction of the Local Legislatures, all "lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province," has shewn its intention of conferring on the Parliament of the Dominion powers of legislation on all matters affecting more than one Province.

The inference I draw from this enactment is quite different and adverse to the pretensions of the Appellant. This sub-sect. 10 contains an exceptional disposition affecting works and undertakings—which could hardly create any irreconcilable sectional feeling and controversy—and which it was thought necessary, on account of their general importance, to submit to the control of the Dominion Parliament. The incorporation of a religious society is not included in this sub-section, and therefore not comprised in its exceptional disposition. If this exception concerning railways, canals, telegraphs and other similar works, had not been made, they would have fallen under the general rule, and all such works made in each Province would have been a Provincial work, subject to Provincial legislation and control. To shew more clearly that the Imperial Parliament intended to place the legislation on these works and undertakings on a different footing from other purely local subjects of legislation, this very sub-sect. 10 also excludes from Provincial legislation all

such works—that is, lines of steamers, railways, etc.—as, although wholly situate within the Province, should be declared by the Parliament of Canada, either before or after their execution, to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. No such power is given by the Act on any other subject of legislation falling within the authority of the Local Legislature, and this purely exceptional provision cannot be extended to other matters not enumerated in this sub-sect. 10. There is, therefore, no more reason for saying that the Dominion Parliament can incorporate a religious society because the promoters of the measure wish to extend its operations to two or more of the Provinces, than there would be for saying that it could declare that a corporation already existing in one of the Provinces is for the advantage of two or more Provinces, and therefore subject to its legislative control.

It is said the statutes now under consideration are not to create a new corporation, but to alter the character and the conditions of an existing corporation under a statute passed by the Parliament of the late Province of Canada, the provisions of which applied equally to the Provinces of Upper and Lower Canada, and it is further argued that the Local Legislature of the Province of Quebec having no right to repeal or alter an Act affecting the late Province of Upper Canada, now constituting the Province of Ontario, the amendments passed by the Legislature of Quebec would have this effect—that a corporation originally established for the two Provinces, under the same Act and the same regulations, would now be governed by different rules and even by different Boards in each Province.

Although this difficulty cannot now arise, since we know that the Legislature of the Province of Ontario has also legislated to the same effect as that of the Province of Quebec, yet it must be admitted that such might have been the result of the amending Acts, and we must be prepared to meet this apparent difficulty.

It will hardly be contended that the Local Legislatures of the Provinces of Ontario and Quebec have not the power to amend or repeal altogether the Acts passed by the late Province of Canada relating to civil rights or local matters in each Province. It is true that the statutes of the late Province of Canada, which were in force when the confederation took place, are continued in Ontario and Quebec by sect. 129 of the Confederation Act, but subject “to be repealed, abolished, or altered by the Parliament of Canada, or

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by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this (the Confederation) Act." We have seen that the authority to pass laws relating to civil rights is in the Local Legislature. This section (129) therefore expressly authorizes the Local Legislatures to repeal, abolish, or alter any statute of the Province of Canada relating to civil rights in the Province to which these Legislatures respectively appertain.

The altering or repealing of such an Act by one Legislature only would not affect its operation in the other Province; and taking the case of a corporation like that of St. Andrew's Church, such a corporation might continue to subsist in one Province and cease in the other. This, however, is a necessary consequence of the authority given to each Local Legislature to deal exclusively with certain matters in relation to their internal affairs.

If inconveniences should result from such an interpretation of the B. N. A. Act, 1867, they are not to be compared to the anarchy which would be created by giving to the Local Legislatures the exclusive authority to legislate generally on all questions of civil rights, and by retaining to the Parliament of Canada the absolute right to legislate on the same subjects, whenever they should have been regulated by statutes passed by the late Province of Canada, or whenever it was proposed to subject two or more Provinces composing the Dominion to the same laws, or extend a statute already in force in one Province to another, or to the whole Dominion. This would enable the Dominion Parliament to interfere in almost every subject-matter of legislation coming within the scope of the legislative powers conferred on the Local or Provincial Legislatures. The Dominion Parliament would only have to declare that it was expedient to have the same laws in more than one of the Provinces of the Dominion, to give itself exclusive jurisdiction in such matters. There would, in that case, be two codes of laws relating to civil rights.

The Provincial Legislature might, for instance, pass laws to prevent the accumulation of property in the hands of private corporations as being contrary to public policy, and at the same time the Parliament of Canada might create new corporations for civil purposes, or amend the charters of existing corporations, and confer upon them the right to acquire and hold property in mortmain to an unlimited extent, the result being the most inextricable confusion.

After the most careful consideration I have been able to give to

this important case, I have come to the conclusion that the Act 38 Vict. c. 64, to amend the Act intituled "An Act to incorporate the Board of Management of the Temporalities Fund of the Presbyterian Church in Canada in connection with the Church of Scotland," is an Act affecting the status, the property, and the civil rights of the corporation within the Province of Quebec, and that under sub-secs. 11 and 13 of sec. 92 of the B. N. A. Act, 1867, these were within the scope of the legislative authority conferred on the Local Legislature of that Province; that the fact that the Board was incorporated by an Act passed by the Parliament of the late Province of Canada, or that the amended Act applied to the two Provinces of Upper and Lower Canada when the B. N. A. Act was passed, did not alter its character, nor subject the corporation to the control of the Parliament of Canada.

I am therefore of opinion, with Mr. Justice Monk, of confirming the judgment rendered by the Court below; and as Mr. Justice McCord is also of opinion of confirming the judgment, although on other grounds, the judgment will be confirmed.

MONK, J. :—

Concurred with the Chief Justice. His Honour adverted to the high standing and position of the united bodies, and to the fact that no injustice had been done to individuals. He was inclined to believe that the Act was constitutional, and, upon the whole case, had no hesitation in concurring in the judgment of the Court below.

Judgment of the Superior Court confirmed, RAMSAY and TESSIER, JJ., dissenting.

JUDGMENT IN SUPERIOR COURT (*before which the suit came originally*).

[*Translation of Report in 3 L. N. 244.*]

JEFFÉ, J. :—

Having heard the parties by their counsel respectively upon the merits of this cause, examined the procedure, the papers filed, and the evidence, seen the admissions filed by the parties, and deliberated; considering that the petitioner alleges by his demand that the corporation, defendants, was created under the name of "The Board of Management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland," for the possession and administration of a certain Fund belonging to the said Church, and previously created by resolution

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of the Synod of the said Church, in January, 1855, and that, by the statute creating and incorporating the said Board, it was among other things provided and guaranteed that the property of the said Fund should belong exclusively to the said Church, that the revenue of the said Fund should be appropriated to the different annual charges imposed on it at the time of its creation in favour of the ministers of the said Church, and finally that the members of the said Board should always be ministers or members of the said Church in full communion therewith, and that four of them should retire and be replaced annually ;

Considering that the petitioner alleges besides that at the time of the creation of the said Fund he was one of the incumbents entitled to a charge or annual allowance of \$450, to be taken from the revenue of the said Fund ; that it was then covenanted, stipulated and admitted as a fundamental principle of the creation of the said Fund, that, in order to have a right to any revenue therefrom, it should be necessary to be a minister of the said Church ; and that the petitioner is still at the present time in full possession of his rights and privileges in this respect, having remained a minister of the said Church, and in full communion therewith ;

Considering that the petitioner alleges moreover that by an Act of the Legislature of the Province of Quebec, passed in 1875, being 38 Vict. c. 64, the conditions of administration of the said Fund have been changed so as to continue in office the members of the said Board for the time being, and to provide for replacing them only in case of a vacancy by death, resignation, or absence, and by persons other than members of the said Presbyterian Church of Canada in connection with the Church of Scotland, and that the said Act authorizes, moreover, the said Board to take from the principal of the said Fund, but that this Provincial statute aforesaid is unconstitutional, and exceeds the power of the said Legislature of the Province of Quebec ;

Considering that the petitioner alleges further that the present members of the said Board have illegally remained in office, as such, by virtue of the unconstitutional Act above mentioned, that they have no right to fill the said office, and that they have, moreover, acted illegally in paying divers sums to ministers no longer forming part of the said Church, and that he prays that the said Provincial statute, 38 Vict. c. 64, be therefore declared unconstitutional, null, and of no effect ; that the defendants be declared not legally elected members of the said Board, and that they be

ordered to cease from holding the said office and administering the said property ; and finally that it be declared that the Temporalities Fund is the exclusive property of the said Church, and cannot be employed otherwise than for the objects provided in the first place, and, moreover, that the Reverends John Cook, James C. Muir, George Bell, John Fairlie, David W. Morrison and Charles A. Tanner be declared no longer ministers of the said Church, and to have no right to the revenue of the said Fund ;

Considering that the defendants, except the Rev. Gavin Lang and Sir Hugh Allan, have contested this demand, affirming among other things the constitutionality of the statute attacked by the petitioner and the legality of their acts ;

Considering that by section 92 of the B. N. A. Act, 1867, it is declared that property and civil rights are exclusively under the jurisdiction of the Provincial Legislatures, and that the rights affected by the said Act, 38 Vict. c. 64, which the petitioner asks to have declared void, fall expressly under the dominion of the said section 92 of the Constitutional Act, and are therefore under the jurisdiction and power of the Provincial Legislature, and that consequently the said Provincial statute is valid and legal, and has full force and effect ;

Considering that although the petitioner is not residing in the Province of Quebec, the legislation of the Parliament of this Province affects the rights which he may possess or claim in the said Province, and therefore that the rights which he invokes in the present case are of necessity subject to the provisions of the said Provincial Act, 38 Vict. c. 64 ;

Considering that by the words of the said Act the defendants are lawfully in office as members of the defendant corporation, and that they are entitled to continue the administration of the property which has been entrusted to them as such ;

Considering that as well by virtue of the said Act, 38 Vict. c. 64, as of another Act of the said Parliament of the Province of Quebec, namely, the statute 38 Vict. c. 62, the legality and constitutionality of which have not been called in question, the said Fund above mentioned has remained subject to all the charges placed upon it in favour of all the incumbents having right thereto, at the time of its creation, and that the right of the petitioner, therefore, to his annual revenue of \$450 has been completely protected and guaranteed ;

Considering, nevertheless, that by the two statutes last mentioned, the property of the said Fund is no longer assigned

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exclusively to the said Presbyterian Church of Canada in connection with the Church of Scotland, but that after the extinction of all prior rights guaranteed by the said Fund, it is transferred to the Presbyterian Church in Canada, formed of the said Presbyterian Church of Canada in connection with the Church of Scotland and of three other Churches, the union of which has been authorized by the said statute, 38 Vict. c. 62, and that by virtue of the dispositions of the said statutes, the said Reverends John Cook, James C. Muir, George Bell, John Fairlie, David Morrison and Charles A. Tanner, were right in receiving, and the defendants were right in paying to them, the sums received by them out of the income of the Fund administered by the defendants ;

Considering, therefore, that the prayer of the petitioner is unfounded and cannot be maintained, and that the defendants (except the Rev. Gavin Lang and Sir Hugh Allan) are well founded in their pleas ;

Maintain the pleas of the said defendants (with the above exception), and dismiss in consequence the demand of the said petitioner, and quash and annul to all intents and purposes the writ of injunction issued in this cause, and give *main levée* thereof to the said defendants, with costs.

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## PRIVY COUNCIL.

THE WESTERN COUNTIES RAILWAY COMPANY.....*Defendant,*

J. C.\*

AND

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THE WINDSOR AND ANNAPOLIS RAILWAY CO. ....*Plaintiff.*Jan. 17, 18, 20;  
Feb. 22.*On appeal from the Supreme Court of Nova Scotia.*[*Reported 7 App. Cas. 178.*]*B. N. A. Act, 1867, s. 108—Power of Canadian Legislature.*

Under the B. N. A. Act, 1867, s. 108, read in connection with the 3rd schedule thereto, all railways belonging to the Province of Nova Scotia, including the railway in suit, passed to and became vested on the 1st of July, 1867, in the Dominion of Canada; but not for any larger interest therein than at that date belonged to the Province.

The railway in suit being, at the date of the statutory transfer, subject to an obligation on the part of the Provincial Government to enter into a traffic arrangement with the respondent company, the Dominion Government, in pursuance of that obligation, entered into a further agreement relating thereto, of the 22nd of September, 1871.

*Quære*, whether it was *ultra vires* of the Dominion Parliament, by an enactment to that effect, to extinguish the rights of the respondent company under the said agreement.

But *held*, that Dominion Act 37 Vict. c. 16, did not, upon its true construction, purport so to do. And although it authorized a transfer of the railway to the appellant, it did not enact such transfer in derogation of the respondent's rights under the agreement of the 22nd of September, 1871, or otherwise.

Appeal from a decree of the Supreme Court of Nova Scotia (April 5, 1881), affirming a judgment of the Judge in Equity of that Court (March 1, 1880).

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\* Present:—Lord Blackburn, Lord Watson, Sir Barnes Peacock, Sir Robert P. Collier, and Sir Arthur Hobhouse.

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STATEMENT.

The facts are stated in the judgment of their Lordships.

The object of the suit was to obtain a declaration of the respondents' title to a railway in Nova Scotia, called the "Windsor Branch," and to recover possession of the same, and for an injunction to restrain the appellants from keeping possession thereof, and running trains thereon, and for an account of their receipts from freight and passengers thereon since it came into their possession.

The main contention of the appellants was that the effect of the Canadian Act (37 Vict. c. 16) had been to deprive the respondents of their rights in respect of the Windsor Branch. The respondents denied that such was the effect of the statute. The Courts below gave effect to this contention. The Equity Judge (Ritchie, J.) held that the true interpretation of the Act was that it only vested the Windsor Branch in the appellants so far as the Government were entitled to deal with it, and subject to the respondents' rights. The Supreme Court (Young, C.J., Ritchie, Desbarres, and Smith, JJ., James, J., dissenting,) without dissenting from the construction put upon the Act by the Equity Judge, held that it was unnecessary to consider it, on the ground that if the Act, upon its true construction, did deprive the respondents of their rights derived under their Act of incorporation and the agreement of 1871, it was a statute dealing with property and civil rights within the Province of Nova Scotia, one of the subjects specially reserved by the B. N. A. Act, 1867, to the Provincial Legislature, and was therefore *ultra vires* and void. Mr. Justice James, on the other hand, held that—(1), the Act of 1867 vested the Windsor Branch in the Dominion Government free from any engagements contracted with respect to it by the Provincial Government; (2), that the Dominion

Legislature was entitled to pass any Act relating to it, and that, upon the true interpretation of 37 Vict. c. 16, it vested the Windsor Branch absolutely in the appellants and deprived the plaintiffs of all right to it.

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Benjamin, Q.C., and Gathorne Hardy, for the appellant company, contended that the judgment of the majority was wrong, and that the respondents had no title to the railway in suit. By the B. N. A. Act, 1867, sec. 108, the railway in suit was made part of the public property of Canada absolutely. The Dominion Government thereupon had full control over it, and the Dominion Parliament absolute legislative jurisdiction in respect to it. By virtue of the Act of 1867, the Dominion Parliament succeeded to the full legislative authority previously possessed in regard to this railway by the Provincial Parliament of Nova Scotia. The agreement, however, of the 22nd of September, 1871, purported to be made in pursuance of the Provincial Act 30 Vict. c. 36, by which the railway continued to be governed after the statutory transfer. It was, however, *ultra vires* the powers conferred by that Act, which did not authorize the executive to enter into an agreement giving the respondents the exclusive use of the Windsor Branch and the right to collect all the tolls thereon. That Act was passed in the interval between the 29th of March, 1867, when the B. N. A. Act was passed, and the 1st of July, the date on which it came into force. So also the agreement of the 22nd of June, 1875, was *ultra vires* the executive, so far as it purported to revive or confirm the agreement of 1871, and was contrary to the Dominion Act 37 Vict. c. 16. The effect of that Act, and the action of the Government thereon, and the delivery by the Government and the acceptance by the appellants of the possession of the railway in suit, was to vest in the appellants the ex-

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clusive right to the possession of the said railway as their absolute property, notwithstanding the agreements of 1871 and 1875. It purported to extinguish the rights of the respondents in the railway, and was operative for that purpose, being *intra vires* the Dominion Parliament.

Horace Davey, Q.C., and Bompas, Q.C. (Beaumont with them), for the respondent company, contended that their title to the railway in suit had not been affected by what had passed. The agreement of 1871 was *intra vires* the executive, and carried out the provisions of their Act of incorporation, 30 Vict. c. 36. Under that agreement, and its subsequent confirmation in 1875, the respondents were entitled as claimed.

With regard to the Dominion Act 37 Vict. c. 16, relied upon by the other side, it did not, upon its true construction, purport to extinguish the rights of the respondents. It did not confer any rights on the appellants, and did not enact any transfer in derogation of the respondents' rights. It merely authorized a transfer which had not been carried into effect. It could not be construed in the way contended for by the appellants unless the intention appeared from express words or necessary implication. Reference was made to *Ward v. Scott* (1); *Barrington's Case* (2); *Prior, of Castleacre*, referred to in *Barrington's Case* (3); *Chalke v. Peter* (4); *Dawson v. Paver* (5); *Hammersmith and City Railway Company v. Brand* (6); *Managers of the Metropolitan Asylum District v. Hill* (7).

Further, the Canadian Acts, which are in the nature of private Acts, are not to affect railways unless specially mentioned: see 31 Vict. c. 1, s. 7, sub-secs. 33, 34.

(1) 3 Camp. 284.

(3) Ibid. 138 a.

(5) 5 Hare 415, 438.

(7) 6 App. Cas. 193.

(2) 8 Rep. 187 b.

(4) Ibid. 136 b.

(6) L. R. 4 H. L. 171.

Then as regards the competence of the Dominion Parliament to pass 37 Vict. c. 16, reference was made to the B. N. A. Act, 1867, s. 92, sub-s. 10, which preserves to the Provincial Legislature the local jurisdiction. But, assuming that the Dominion Legislature has absolute power to legislate over public property (that is the interest of the Government or the public in the *res*), there was no power to extinguish private rights therein—such, for instance, as the rights of the respondents under their Act of incorporation, and the agreement of 1871: see also sub-s. 11. The Dominion Parliament cannot repeal the Provincial Act 30 Vict. c. 36, and thereby affect the terms of the respondents' incorporation. In s. 94, the Imperial Parliament contemplates double legislation on certain subjects, and provides for it. Reference was made to *L'Union St. Jacques de Montreal v. Belisle* (1); *Dow v. Black* (2); *Citizens Insurance Co. v. Parsons* (3).

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Benjamin, Q.C., replied.

The judgment of their Lordships was delivered by

LORD WATSON:—

In the present case each of the contending parties claims the exclusive right to possess and work the Windsor Branch Railway, in the Province of Nova Scotia. This line was originally constructed as one of the public railways of the Province, and was intended to be part of a general system connecting Halifax and other towns of importance with the frontier of the Province of New Brunswick. After the passing of the B. N. A. Act, 1867, and in accordance with its provisions, all railways belonging to the Province of Nova Scotia, including the line in question, passed to and became vested in the Dominion of Canada.

(1) L. R. 6 P. C. 31; *ante*, p. 63.

(2) *Ibid.* 272; *ante*, p. 96.

(3) 7 App. Cas. 96; *ante*, p. 265.

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The Chief Commissioner of Railways for Nova Scotia, acting under authority conferred upon him by the Provincial Act 28 Vict. c. 23, entered, in November, 1866, into an agreement with Messrs. Punchard, Barry, and Clark, of London, whereby those gentlemen became bound to make a railway, which was to be their own property, from Windsor, one of the termini of the branch in question, to Annapolis. By that agreement it was *inter alia* provided that before the new line from Windsor to Annapolis was opened by Messrs. Punchard, Barry, and Clark, a traffic arrangement was to be made between them and the Provincial Government, "for the mutual use and enjoyment of their respective lines of railway between Halifax and Windsor, and Windsor and Annapolis, including running powers, or for the joint operation thereof, on equitable terms to be settled by two arbitrators, to be chosen by the parties in case of difference."

By an Act of the Legislature of Nova Scotia, passed upon the 7th of May, 1867 (30 Vict. c. 36), Messrs. Punchard, Barry, and Clark were constituted a body corporate by the name of the Windsor and Annapolis Railway Company; and the agreement of November, 1866, between them and the Chief Commissioner of Railways, was, by the same Act, adopted and confirmed.

The Windsor Branch Railway became the property of the Dominion upon the 1st of July, 1867, being the day appointed by Her Majesty, in terms of s. 4 of the B. N. A. Act, for the provisions of that Act coming into operation. And on the 22nd of September, 1871, the Government of Canada, as then owners of the railway, and in implement of the obligation to make a "traffic arrangement" which is contained in the agreement of November, 1866, entered into a new agreement with the Respondents, the Windsor and Annapolis Railway Company.

It is unnecessary to consider in detail the whole terms

of the agreement of 1871. Its provisions, so far as bearing upon the present case, are in substance these: The exclusive use and possession of the Windsor Branch Railway were made over to the Respondent Company, with running powers over the trunk line, also belonging to the Dominion Government, which connects the Windsor Branch with Halifax. The Dominion Government was to maintain the Windsor Branch as well as the trunk line in workable condition, whilst the Respondent Company undertook to render and adjust regular monthly accounts of all traffic carried by them over these lines, and to pay to the Government, not later than twenty-one days from the end of each month, one-third of their gross earnings from such traffic. The company also undertook to provide rolling stock, and to run a certain number of trains daily, with stated hours of departure and arrival, and to conduct their business and traffic with impartiality and fairness. No right of re-entry was reserved in case of the company's failure punctually to make payment of one-third of their earnings, but it was stipulated (Art. 19) that "in the event of the company failing to operate the railways between Halifax and Annapolis, then this agreement shall terminate, and the authorities may immediately proceed to operate the railway between Halifax and Windsor as they may deem proper and expedient." Last of all, it was provided that the agreement should take effect upon the 1st day of January, 1872, and continue for twenty-one years, and be then renewed on the same conditions, or upon such other conditions as might be mutually agreed on.

In accordance with the foregoing agreement, the Respondent Company, in January, 1872, took possession of and worked the Windsor Branch line. Shortly afterwards the monthly payments due to Government fell into arrears, but these arrears were paid in full in November,

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1872, in consequence of a threat that Government would resume possession of the railway. During the following year the company again failed to make payment of the third of the traffic receipts for which they were liable to the Dominion Government, who intimated that, unless all arrears were paid up on or before the 1st of October, 1873, they would resume possession.

On the 22nd day of October, 1873, an order of the Privy Council of Canada was passed, approving of a report, dated the 21st of the same month, from the Minister of Public Works, stating that "the Windsor and Annapolis Railway Company had failed to operate the railway known as the Windsor Branch, mentioned in Order in Council of the 22nd of September, 1871, and to comply with the other terms and conditions of that Order in Council, and now owe \$30,000 to the Government of Canada, and though repeatedly called upon to pay have failed to do so; and recommending that, inasmuch as the said Company have failed to operate one of the railways between Halifax and Annapolis, the Government of Canada, known as 'the authorities' by the said Order in Council, do proceed immediately to operate the railway between Halifax and Windsor."

On the same day (the 22nd of October, 1873), the Governor-General in Council, subject to the sanction of Parliament, approved of a proposal made by the Appellant Company for a transfer to them of the Windsor Branch Railway, upon these conditions:—

"1st. The said company will undertake to receive the said railway and appurtenances on the first day of December, Anno Domini 1873, and from that date to work it efficiently and keep the same in repair at their own proper costs and charges, collecting, receiving, and appropriating to their own use all the tolls and earnings of the same.

"2nd. That on the completion of the Western Counties Railway from Yarmouth to Annapolis (now in course of construction), the said railway and appurtenances, from Windsor to the trunk line, shall be and become absolutely the property of the said Western Counties Railway Company.

"3rd. That, in consideration of the premises, the said company hereby engage to prosecute the work of building the railway from Yarmouth to Annapolis, and to complete the same with all reasonable despatch."

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On the 30th of October, 1873, the Governor-General in Council approved, subject as before to parliamentary sanction, of a further proposal made by the Appellant Company in these terms:—

"1st. That the Western Counties Railway Company shall carry, free of charge, all passengers holding Government tickets, on all their passenger trains running between Halifax and Windsor Junction.

"2nd. That the said company, or their agents or assigns, shall have running powers over the Intercolonial Railway, between Halifax and Windsor Junction, with such privileges as have been hitherto granted in the agreement with the Windsor and Annapolis Railway."

On the 26th of May, 1874, an Act was passed by the Parliament of Canada (37 Vict. c. 16), entitled "An Act to authorize the transfer of the Windsor Branch of the Nova Scotia Railway to the Western Counties Railway Company." The proposals of the Appellant Company, which were provisionally agreed to by the Orders in Council of the 22nd and 30th of October, 1873, respectively, were set forth at length in schedules A and B, appended to the Act, and are referred to and sanctioned by the enacting clauses. It will be necessary hereafter to

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examine this statute more closely, because the Appellant's case is mainly founded upon its provisions, and the parties are widely at variance as to their true import and effect.

Upon the 22nd of June, 1875, the Respondent Company entered into an agreement with the Minister of Public Works of Canada, by which the company, on the one hand, undertook to alter the gauge of the Windsor and Annapolis Railway from 5 ft. 6 in. to the standard gauge of 4 ft. 8½ in., to deliver to the Minister a certain quantity of locomotives and other broad gauge plant, and to release all claims and demands against the Government of Canada up to the 1st day of July, 1875. On the other hand it was agreed that, upon the change of gauge being effected, all arrears of traffic receipts due by the company to the Government, which had accrued up to the 1st of January, 1875, should be discharged, and that the Minister of Public Works should then deliver to the company a like quantity of narrow gauge engines and rolling stock. It was further stipulated that the company should, on or before the 31st of July, 1875, make payment of the third of gross earnings which had accrued after the 1st of January, 1875, and that the proportion of such traffic earnings due to the Government, and thereafter accruing, should "be paid monthly, as provided in the said agreement under which the company hold and work the branch as aforesaid, which (except as aforesaid) is hereby declared in all respects in full force and effect." In pursuance of this agreement the Respondent Company altered the gauge of their line, and regularly made the payments therein stipulated, and an exchange of engines and rolling stock was also made in terms thereof.

The Respondent Company remained in full possession of the Windsor Branch line, and continued to work the same from the beginning of the year 1872 until the 1st

of August, 1877. On that date the Dominion Government took possession of the Windsor Branch line, and on the 24th of September following transferred the possession of it to the Appellant Company under the agreement scheduled to the Canadian Act of the 26th of May, 1874.

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The Respondent Company, upon the 10th of October, 1877, filed a bill in the Supreme Court of Nova Scotia against the Appellant Company, wherein it was prayed, *inter alia*, that the latter company should be ordered to deliver up possession to them of the Windsor Branch Railway. The Appellant Company appeared and demurred to the bill, but their demurrer was, on the 11th of March, 1878, overruled by the judge in equity, and an appeal taken against that judgment was dismissed by the Supreme Court, sitting in Banco, upon the 29th of August, 1878, James, J., alone dissenting. The cause then returned to the judge in equity, and after the Appellant Company had put in their answer, and evidence had been adduced by both parties, Mr. Justice Ritchie, upon the 1st of March, 1880, gave judgment in favour of the Respondent Company with costs; and his judgment was affirmed with costs by the Supreme Court of Nova Scotia, on the 6th of April, 1881, James, J., being again the only dissentient judge.

Some of the points, unsuccessfully maintained by the Appellant Company in the courts of Nova Scotia, were not pressed in the argument addressed to this Board. The two propositions seriously maintained by the Appellants were these: (1) That the Act passed by the Parliament of Canada upon the 26th of May, 1874 (37 Vict. c. 16), extinguished all right and interest which the Respondent Company had in the Windsor Branch Railway, by virtue of the agreement of the 22nd of September, 1871, and transferred to the Appellant Company a present

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right to the exclusive possession, and a future right to the exclusive property of the said railway; and (2) that the Parliament of Canada had, under the provisions of the B. N. A. Act, 1867, ample legislative authority to take away, without compensation, any right in or relating to the railway which might be vested in the Respondent Company, and to transfer it to the Appellants. It is not disputed that if either of these propositions be not well founded the Appellants' case must fail.

The 108th section of the B. N. A. Act, 1867, which must be read in connection with the third schedule of the Act, had the effect of transferring, upon the 1st of July, 1867, to the Dominion of Canada, all railways which were the property of the Province of Nova Scotia. Their Lordships are of opinion that it had not the effect of vesting in Canada any other or larger interest in these railways than that which belonged to the Province at the time of the statutory transfer. Accordingly, the Dominion took the property of the Windsor Branch Railway, subject to the same obligation by which the right of the Provincial Government was affected, viz., to enter into a traffic arrangement with the Respondent Company in terms of the agreement confirmed by the Provincial statute of the 7th of May, 1867; and it was in pursuance of that obligation that the Dominion Government entered into the agreement of the 22nd of September, 1871. The agreement thus made was valid, and must continue to receive effect until it has been terminated by the default of the Respondent Company, by the mutual consent of parties, or by the action of a competent Legislature.

As already stated, the Appellant Company maintains that the agreement in question has been put an end to by the Act of a competent Legislature. In dealing with that contention, it will be convenient to consider, in the first place, whether, on the assumption that the Dominion

Parliament had authority to enact the 37 Vict. c. 16, the provisions of that Act do extinguish those rights in relation to the Windsor Branch which are conferred upon the Respondent Company by the agreement of 1871.

The proposals or provisional agreements which are scheduled to the Act 37 Vict. c. 16, contain two distinct stipulations, the one relating to the possession and use, and the other to the property of the Windsor Branch Railway. By the first, the Appellant Company "undertake to receive the said railway and appurtenances on the first day of December, Anno Domini eighteen hundred and seventy-three," and to work it efficiently thereafter. Although the company undertake to receive, there is no corresponding obligation laid upon the Government to give them possession of the railway, either upon the 1st of December, 1873, or at any other specified date. By the second of these stipulations, it is provided that, upon the completion of the Western Counties Railway, then in course of construction from Yarmouth to Annapolis, the Windsor Branch Railway and its appurtenances shall be and become the absolute property of the Appellant Company. The Governor-General, with advice of his Council, would probably have been entitled, by virtue of the administrative powers conferred upon him by the 12th section of the B. N. A. Act, 1867, to make a valid agreement in regard to the possession and working of the line; but it is, at least, very doubtful whether he would have had the right to alienate the property of the line without the sanction of the Dominion Parliament. Be that as it may, the Parliament did interpose upon the 26th of May, 1874, to the effect, the Appellants say, of destroying the previously subsisting agreement between the Government and the Respondent Company.

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Neither in the Act 37 Vict. c. 16, nor in the schedules appended to it, is mention made of the agreement of the 22nd of September, 1871, or indeed of any right or interest of the Respondent Company in the Windsor Branch Railway. The canon of construction applicable to such a statute is that it must not be deemed to take away or extinguish the right of the Respondent Company, unless it appear, by express words or by plain implication, that it was the intention of the Legislature to do so. That principle was affirmed in *Barrington's Case* (1), and was recognised in the recent case of *The River Wear Commissioners v. Adamson* (2). The enunciation of the principle is, no doubt, much easier than its application. Thus far, however, the law appears to be plain—that in order to take away the right it is not sufficient to shew that the thing sanctioned by the Act, if done, will of sheer physical necessity put an end to the right; it must also be shewn that the Legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights.

It appears to their Lordships that there is nothing in the provisions of the Dominion Act, 37 Vict. c. 16, to warrant the inference that the Parliament of Canada must have intended thereby to enact that immediate possession of the Windsor Branch, for the purpose of working it, was to be given to the Appellant Company under the agreements scheduled, even though there should be a subsisting arrangement for the working of the line. Indeed, the contrary appears from the 2nd section of the Act, to which reference will be made hereafter.

The preamble of the Act recites the proposed transfer of the railway to the Appellant Company, and also a resolution of the Canadian House of Commons, of date the 23rd of May, 1873, to the effect that the Government

(1) 8 Rep. 138 a.

(2) 2 App. Cas. 743.

should be authorized to enter into negotiations for the transfer of the Windsor Branch to some reliable association or company, "upon condition that such company extend the railway from Annapolis to Yarmouth." It makes no reference to any right belonging to or asserted by the Respondent Company, nor does it refer to that part of the scheduled agreement which relates to the willingness of the Appellant Company to undertake to receive the railway and appurtenances upon the 1st of December, 1873. It is impossible, therefore, to gather from the terms of the preamble an intention to terminate at once any temporary right of possession which might belong to the Respondent Company. The transfer of the railway was obviously not expected to take place at once. It was dependent upon a condition which might never be fulfilled, and which admittedly has not yet been fulfilled, viz., the completion of the line from Yarmouth to Annapolis by the Appellant Company. Besides, the transfer of the property of the railway is nowise inconsistent with the fact of working arrangements affecting the transferor's right continuing to affect the right of the transferee.

Then comes the leading enactment of the statute, as contained in s. 1, which is in these terms:—"The agreements hereinbefore referred to, and set forth in the schedules A and B to this Act, being such as were adopted by the orders of the Governor in Council of the 22nd and 30th days of October, 1873, and all the matters and things therein contained, are hereby approved and declared to be as effectual to all intents and purposes as if the said agreements had been entered into in pursuance of sufficient authority in that behalf given before the adoption of such agreements by Act of the Parliament of Canada."

It was argued for the Appellants that the effect of the preceding clause is precisely the same as if the Parlia-

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ment of Canada had, prior to October, 1873, passed an Act authorizing the Governor in Council to make an agreement with the Appellant Company in terms of the proposals set forth in schedules A and B. That argument appears to be well founded; but what would have been the effect of such antecedent statutory authority? Their Lordships are unable to discover any term in the contract contained in schedules A and B binding the Government to give the Appellant Company immediate possession of the line, or to transfer the property of the line, free of all contracts or arrangements whatsoever; and if such an obligation cannot be inferred from the language of the agreements sanctioned by the Legislature, it is impossible to derive from the language of this section any intention to defeat the Respondent Company's right of possession.

It appears to their Lordships that even if the terms of these proposals had contemplated the immediate transfer of possession to the Appellant Company, that would not have been necessarily conclusive against the Respondents in this appeal. There is a great difference between giving authority to make an agreement and authorizing it to be made and forthwith carried out so as to override and destroy all private rights that may stand in its way.

The 2nd and only other section of the Act provides that until arrangements are completed for giving possession of the line to the Appellant Company, for the purpose of working it until the completion of their line from Annapolis to Yarmouth, the Government shall have power to make such other arrangements as may be necessary, "by continuing the working of the same by the Windsor and Annapolis Railway Company, or otherwise." These provisions certainly do not suggest that it was in the contemplation of Parliament that immediate possession of the Windsor Branch Railway was to be given to the Appellant

Company for the purpose of operating it; on the contrary, they are apparently intended to meet the case of the Government declining to give possession of the line to the Appellant Company at the time when the latter had undertaken to receive it. Nor do these provisions necessarily indicate that, if there should be a subsisting working agreement with the Respondent Company, or any other company, that agreement was to be set aside in order to admit of the Government making such an arrangement as is provided for in this section. In case of there being no such standing agreement in the way, the powers conferred upon the Government are very wide; and even if the agreement of 1871 had been determined, it is by no means clear that the agreement of the 22nd of June, 1875, would not give the Respondent Company right to continue their possession of the line.

In the view which their Lordships take of the import and effect of the Canadian Act, 37 Vict. c. 16, it becomes unnecessary to decide whether, if it had chosen to do so, the Parliament of Canada would have had the power to extinguish the rights of the Respondent Company under the agreement of the 22nd of September, 1871. Whether that power is given by the provisions of the B. N. A. Act to the Dominion Parliament or to the Legislature of Nova Scotia is a question of difficulty and importance; but seeing that it does not arise for decision in the present case, their Lordships express no opinion whatever in regard to it.

Their Lordships will, therefore, humbly advise Her Majesty that the judgments of the Courts below ought to be affirmed, and the appeal dismissed. The Appellants must pay the costs of the appeal.

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## SUPREME COURT OF CANADA.

1877\*  
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 June 6, 7.

JOHN SEVERN ..... *Appellant,*

AND

1878\*  
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 Jan. 28.

THE QUEEN ..... *Respondent.*

*On appeal from a judgment of the Court of Queen's Bench for Ontario.*

[*Reported 2 Can. S.C.R. 70.*]

37 *Vict. c. 32, O.—B. N. A. Act, 1867, secs. 91, 92.—Brewers' Licenses, power of Provincial Legislature to impose.*

The right conferred on Provincial Legislatures by sub-sec. 9 of sec. 92 of the B. N. A. Act to deal with "shop, saloon, tavern, auctioneer and other licenses," does not extend to licences on brewers.

*Regina v. Taylor*, 36 U. C. Q. B. 218, overruled.

[RITCHIE and STRONG, JJ., dissenting.]

Appeal from a judgment of the Court of Queen's Bench for Ontario, overruling the demurrer of the defendant, John Severn, to a criminal information filed against him by the Attorney-General of the said Province, on behalf of Her Majesty the Queen, in the said Court, on the 23rd day of January, 1877.

This appeal was brought directly to the Supreme Court, by consent of parties, under sec. 27 of the Supreme and Exchequer Court Act.

The information was for the contravention by the

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\* Present:—Sir William Buell Richards, C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, JJ.

defendant of the provisions of the Act of the Legislature of Ontario, 87 Vict. c. 82, respecting the sale of fermented or spirituous liquors, in that the defendant "on the nineteenth day of January, in the year of our Lord aforesaid, at the Town of Yorkville, in the County of York aforesaid, after the passage of a certain Act of the Legislature of the Province of Ontario, made and passed in the thirty-seventh year of the reign of our Sovereign Lady the present Queen, intituled 'An Act to amend and consolidate the law for the sale of fermented and spirituous liquors,' then being a brewer licensed by the Government of Canada for the manufacture of fermented spirituous and other liquors, did manufacture a large quantity of fermented liquors, to wit, one thousand gallons of beer, and afterwards, to wit, on the twentieth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, at the Town of Yorkville aforesaid, in the County of York aforesaid, unlawfully and wilfully and in contravention of the said Act of the Legislature of the Province of Ontario, did sell by wholesale a large quantity of the said fermented liquor so manufactured by the said John Severn as aforesaid, to wit, five hundred gallons of beer, for consumption within the Province of Ontario, to wit, at the Town of Yorkville aforesaid, in the County of York aforesaid, without first obtaining a license, as required by the said Act of the Legislative Assembly of the Province of Ontario, to sell by wholesale, under the said Act, liquors so manufactured by him the said John Severn as aforesaid, for consumption within the said Province of Ontario, and without having obtained any shop license or any other license under the said Act, or under the Act passed by the said Legislature of Ontario in the thirty-ninth year of the reign of our Sovereign Lady the present Queen, intituled 'An Act to amend the law respecting the sale

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of fermented or spirituous liquors,' to sell wholesale, as a brewer, liquor, in wilful contravention of the said Act of the Legislature of the Province of Ontario, passed and made as aforesaid, and in contempt of our Sovereign Lady the Queen and her laws, and to the evil example of all others in the like case offending, and contrary to the form of the Statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity."

On the 25th of January, 1877, the said John Severn, by his attorney, F. Osler, having heard the information read, said: that the information and the matters therein contained are not sufficient in law, and that the defendant is not bound to answer the same.

One of the points to be argued was that the Legislature of the Province of Ontario had no power to pass the statute under which the said penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale, as stated in the information.

The Attorney-General joined in demurrer.

In a case of a similar information, *Regina v. James Taylor* (1), the Court of Queen's Bench gave judgment for the defendant on the demurrer to the information. The Court of Appeal for the Province of Ontario reversed the judgment of the Court of Queen's Bench and overruled the demurrer of *James Taylor*.

An appeal was subsequently prosecuted by the said *James Taylor* to the Supreme Court of Canada, when, after argument, the Supreme Court decided (2) that it had no jurisdiction to entertain the said appeal, inasmuch as the judgment appealed against was prior to the organization of such Court.

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(1) 36 U. C. Q. B. 183; 218.

(2) 1 Can. S. C. R. 65.

In consequence of this decision, Harrison, C. J., delivered the judgment of the Court of Queen's Bench as follows:—

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"We have read the decision of the Court of Appeal in *Regina v. Taylor*, 36 U. C. Q. B. 218, reversing the decision of this court, reported at p. 183 of the same volume.

"If the Court of Appeal were a court of final resort, we should, in the present case, follow the decision of the Court of Appeal without observation of any kind. But as the Court of Appeal is not a court of final resort, and as we are informed that it is the intention of the defendant in this case, with the consent of the Crown, under section 27 of the Supreme Court Act, at once to carry this case to the Supreme Court; and so, if possible, have *Regina v. Taylor*, 36 U. C. Q. B. 218, reversed; we, in deference to the existing decision of the Court of Appeal, and not from any actual conviction that it is correct, follow it, and give judgment for the Queen."

The Act in dispute under this appeal is the 37 Vict. c. 82, of the Ontario Legislature.

The clauses considered were the following:—

"Section 24. No person shall sell by wholesale or retail, any spirituous, fermented or other manufactured liquors within the Province of Ontario, without having first obtained a license under this Act, authorizing him so to do: Provided that this section shall not apply to sales under legal process, or for distress, or sales by assignees in insolvency.

"25. No person shall keep or have in any house, building, shop, eating-house, saloon or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented, or other manufactured liquors, for the purpose of selling, bartering or trading therein,

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unless duly licensed thereto, under the provisions of this Act."

The two preceding sections, by sec. 26, were not to prevent a brewer or distiller duly licensed by the Dominion of Canada from keeping, having, or selling any liquor manufactured by him. Provided that such brewer, distiller, etc., is further required to first obtain a license to sell by wholesale under that Act the liquor so manufactured by him when sold for consumption within this Province, but not in quantities less than prescribed by section 4 of the Act.

Section 22 enacts: "There shall be paid . . . for each license by wholesale a duty of fifty dollars." All the duties under this section are for the purposes of Provincial revenue.

Section 4. "A 'license by wholesale' shall be construed to mean a license for selling, bartering or trafficking, by wholesale only, in such liquors in warehouses, stores, shops, or places other than inns, ale or beer houses, or other houses of public entertainment, in quantities not less than five gallons in each cask or vessel, at any one time; and in any case where such selling by wholesale is in respect of bottled ale, porter, beer, wine or other fermented or spirituous liquor, each such sale shall be in quantities not less than one dozen bottles of at least three half pints each, or two dozen bottles of at least three-fourths of one pint each, at any one time."

Mr. J. Bethune, Q.C., for the Appellant:—

The statute in question, 37 Vict. c. 82, O., was passed to consolidate the license laws of the Province, but it not only consolidates but amends these laws.

In the consolidated Act there is no special amendment so far as brewers are concerned. Sec. 4 defines license by "wholesale." The effect of this seems to be to

compel brewers to take out a license at an expense of \$50 before selling by wholesale. Now, the Dominion Government derives its income from customs and excise, which are regulated by 31 Vict. c. 8, D. By the second section of that Act the word "brewer" is defined, and by the third it is stated that no other person than a licensed brewer can carry on business or trade, etc. The Dominion Government thereby assumed jurisdiction in this matter. The point of importance is, what are the relative rights and relative jurisdictions of the Dominion Parliament and Provincial Legislatures over this subject-matter?

The only authority under which the Provincial Legislature claims the power of making laws in relation to matters relating to trade and commerce is sec. 92, sub-s. 9, of the B. N. A. Act. But the whole of that section must be governed by sec. 91, under sub-s. 2, of which the regulation of trade and commerce belongs exclusively to the Dominion Parliament. The fair construction of the words trade and commerce includes both internal and external trade.

The Dominion Government derives its income from customs and excise, which are regulated by 31 Vict. c. 8, D. Under sec. 91, sub-ss. 2 and 3, the Dominion Parliament has the power to pass laws for "the regulation of trade and commerce" and "the raising of money by any mode or system of taxation."

Now, the right of the Ontario Legislature to pass and maintain the provisions of this Act must rest either upon its power to impose direct taxation within the Province, in order to the raising of a revenue for provincial purposes, or upon its power to legislate upon matters relating to licenses and municipal institutions. It cannot be denied that the whole B. N. A. Act shews that it was intended to divide the jurisdiction between the two

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legislative bodies, the jurisdiction of each being complete as to cases within its power. See upon this point the judgment of the Court of Appeal for Lower Canada in *Ex parte Dansereau* (1); *Dow v. Black* (2); *L'Union St. Jacques de Montreal v. Belisle* (3).

Then, can this Act be sustained under sec. 92, sub-s. 2 of the B. N. A. Act; in other words, is this charge or duty imposed upon brewers a direct or indirect tax? Appellant contends that it is an indirect tax, the effect of which is to raise the price and value of the beer by at least the amount of the tax. Imposing a tax upon the steamboat instead of the passengers which it carries, is an indirect tax: *Gibbons v. Ogden* (4). The Imperial Parliament treat this as an indirect tax, because they would not have given the power by sub-sec. 9 if it was direct. The judgments of the Court of Queen's Bench and the Court of Appeal in *Regina v. Taylor* agree as to this. But it is contended that the Ontario Legislature possesses the right of imposing this tax under sub-s. 9 of sec. 92 of the B. N. A. Act. Now, this sub-section must be looked upon as giving an exceptional right, limited in its character, to impose indirect taxation. You must either restrict this power of granting "other licenses" or give the Local Legislature a jurisdiction as complete and as full as that of the Dominion Legislature. Now, the trade of a brewer is one regulated exclusively by the laws of the Dominion of Canada, and the history of trade and distilling shews that brewing was always regarded as coming under the Excise Laws.

*R. v. Justices of Surrey* (5); *Burns's Justice of the Peace* (6); *Con. Stats. of Canada*, cap. 19; *Con. Stats. of Lower Canada*, cap. 6, sec. 1; cap. 24, sec. 26, sub-

(1) 19 L. C. Jur. 210.

(4) 9 Wheaton 1, 231.

(2) L. R. 6 P. C. 272; *ante* p. 95.

(5) 2 T. R. 504.

(3) L. R. 6 P. C. 31; *ante* p. 63.

(6) Vol. 2, p. 190.

sec. 10; 27 and 28 Vict. cap. 8; 29 Vict. cap. 8; Revised Statutes of Nova Scotia, cc. 17 and 19; Revised Statutes of New Brunswick, vol. 1, cap. 18; Crabbe's History of English Law (1); Temperance Act of 1864, of the Province of Canada; Quebec Resolutions, which constituted the foundation of the Imperial Act; Journals Legislative Assembly of the Province of Canada (2); Journals of same Assembly (3); 29th Resolution, sub-sec. 4. Lord Carnarvon's explanation, on the second reading of the Bill in the House of Lords, shews that these Resolutions were the basis of the Statute (4).

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The jurisdiction as to excise was intended to be in the Dominion Parliament, and would therefore be exclusive. One method of regulating excise is by taxation: Story on the Constitution (5). The only head of concurrent jurisdiction is under section 95, and even then Provincial Legislatures must yield to Dominion when they conflict.

Either the words "other licenses" must be construed to be of the same class as those mentioned in the preceding part of the sub-section: *East London Water Works v. Mile End Old Town (Trustees)* (6); *Reed v. Ingham* (7); *Williams v. Golding* (8); this is also the view taken by Torrance, J., in the case of *Angers v. The Queen Insurance Co.*, decided at Montreal, in April, 1877 (9);—or must be held to mean such licenses as were before the passing of the Imperial Act under municipal or local control: Maxwell on Statutes (10).

If the term "other licenses" be not thus limited, the Legislature may require anything to be licensed, for instance, may require a license to be taken out by a captain of a vessel, or by a banker, or official assignee.

(1) pp. 477, 482.

(2) Vol. 24, pp. 203, 209.

(3) Vol. 26, p. 362.

(4) Hansard, Vol. 185, p. 563.

(5) Section 971.

(6) 17 Q. B. 512.

(7) 3 E. & B. 889.

(8) L. R. 1 C. P. 69.

(9) 21 L. C. Jur. 81; ante p. 117.

(10) Page 308.

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There are a large class of local licenses of less importance than those enumerated in this sub-section, such as those enumerated in the Municipal Act of 1866.

As to the argument put forward on behalf of the Crown, in support of the judgment in this case, that the Act is not *ultra vires*, because it has reference to a subject-matter over which its powers are as full and complete as those of the Dominion Parliament as a matter of police—appellant contends that this power is a grant from the Dominion Government, a branch of criminal law over which the Dominion has entire control.

What is known in the United States as police power in the States is founded upon the right which exists on the part of the State Legislatures to make laws for the good government of the State in all cases in which jurisdiction is not given to the Congress.

The jurisdiction to enact Criminal Laws, except for offences committed on the high seas and offences committed against the United States Government, exists on the part of the State Legislatures. The basis of the right to make laws of police is Criminal Law. License Cases (1).

The cases decided by the United States Courts as to laws in the nature of police do not apply with equal force to Canada, because the Provincial Legislatures have jurisdiction only in such matters as are expressly mentioned in section 92.

This is plain from section 91.

The Quebec Resolutions numbered 29, 43 and 45 shew that this was what was intended.

As to the power of disallowance, that power belongs to only one branch of the Dominion Parliament, and

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(1) 5 Howard, at pages 590, 591, 592, and 625; Story on the Constitution, 4th edition, sec. 1954; Cooley on Const. Limitations, 483; Dwarria on Stats. by Potter, p. 450, and subsequent pages; Blackstone's Coma., vol. 4, page 113.

can be exercised in different ways. In the United States it is held that the moment Congress exercises its power over a subject-matter the State has no control, provided that Congress was first to exercise it.

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It is further contended on the part of the respondent, that the power to sell in Ontario must come from the Ontario Government and that under the Act it can be called a shop license.

The answer to this will be found in *Brown v. State of Maryland* (1). It is as much a part of the trade of the brewer to sell as to manufacture.

It would be mockery to say: I will give you the right to manufacture, but the Provincial Legislature says you must get a shop license before you can sell. See also Kent's Commentaries (2).

If this sub-section 9 of section 92 gives power to require a license to be taken out by a brewer, the Legislature has power also to require the license to be obtained from the municipality or from the Provincial Government, or from both. This would very much embarrass this branch of trade, and might so fetter it as to destroy it.

Mr. Mowat, Q.C., Attorney-General for Ontario (Mr. Crooks, Q.C., with him), for the Respondent:

I claim for the Provinces the largest power which they can be given: it is the spirit of the B. N. A. Act, and it is the spirit under which confederation was agreed to. If there was one point which all parties agreed upon, it was that all local powers should be left to the Provinces, and that all powers previously possessed by the Local Legislatures should be continued unless expressly repealed by the B. N. A. Act. The larger

(1) 12 Wheaton, pp. 442, 443, 446.

(2) 12 Ed. vol. 1, p. 439.

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powers given to the Dominion were for the purposes of nationality, so that in construing the B. N. A. Act, the intention was not to take from Provincial authorities any more than was necessary. Take, for instance, the administration of justice; nothing in the Act says to whom belong the executive powers of the administration of justice, yet from the very beginning it was assumed that the local authorities have the same powers as before Confederation. We find that express power was given by c. 128, 14 and 15 Vict., to the City of Montreal to tax brewers. The same power may surely be trusted to a Provincial Government. Another point of great importance is the provision in the Act (sec. 90) by which legislation of the Local Legislatures can be vetoed. The relation of the Provinces here is different from that which the States bear to the United States. There the Courts alone have power to declare when the States have usurped the higher powers of Congress, whilst here ample power is given to the Dominion Parliament of protecting itself.

This Act has now been in operation for several years. It has been contended that it is only one branch of the Parliament that has the right of disallowing the Provincial Acts. I think it will be admitted by all parties here that the Governor-General must take the advice of his council when vetoing local Acts.

This power of disallowance should be taken into consideration when the policy of the Act is urged against us.

The regulation of the sale of all liquor for consumption in the Province, whether manufactured in the Province or not, is of Provincial concern, and the immunity of the person manufacturing in the Province, as part of the Dominion, under the excise regulation of the Inland Revenue Department, no more makes him free of Pro-

vincial regulations, than the person importing liquor under the Customs regulations of another Department.

Section 92 of the B. N. A. Act, 1867, confers upon the Legislature of each Province the jurisdiction of making laws so as to exclude the authority of the Parliament of Canada in relation to matters coming within the classes of subjects enumerated in that section, and where the Legislature possesses jurisdiction the Court has no power to review the exercise of it.

Where there is jurisdiction, the will of the Legislature is omnipotent according to British theory, and knows no superior law in the sense in which the American Courts are accustomed to adjudicate upon constitutional questions.

See Blackstone (1); Sedgwick, Statutory and Constitutional Law (2); De Tocqueville's Democracy in America, cap. 6; Broom's Constitutional Law (3); Pomeroy's Constitutional Law (4); Story on the Constitution of the U. S. (5); Cooley's Constitutional Limitations (6); and cases commented on in these authorities.

The requirement of the license is neither obnoxious as being an indirect mode of taxation, nor as being repugnant to the jurisdiction of the Dominion in the regulation of trade and commerce.

The tax here is direct upon the person, and not upon the commodity, with the view of enhancing the selling price thereof to the extent of the tax imposed.

See as to nature of tax, Fawcett's Political Economy (7); Baxter on Taxation (8); Bowen's Political Economy (Mass.) (9).

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(1) Blackstone's Com. by Kerr, Vol. I, p. 36.

(2) Pomeroy's Ed., 1874, and cases in note, pp. 404-5.

(3) p. 795.

(7) Book 4, ch. 3, p. 477.

(4) Secs. 142, 143, 306 *et seq.*

(8) pp. 15. 20 and 21.

(5) Ed. 1873, Book 3, ch. 3.

(9) p. 436.

(6) Ed. 1871, pp. 2, 4 and 86.

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The taxing power is also commensurate with and essential to the existence of the Government, and this mode of its exercise is not excluded from Provincial jurisdiction.

See Marshall, C. J., in *Providence Bank v. Billings* (1); *McCulloch v. State of Maryland* (2); *In re Slavin v. The Corporation of Orillia* (3); Marshall, C. J., in *Gibbons v. Ogden* (4); Story on the Constitution of the U. S. (5).

Now, amongst the matters in which the Provincial Legislature has this exclusive jurisdiction under class 9 are included "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for Provincial, local, or municipal purposes."

(a) The term "shop" may as well cover the license to a brewer when selling for consumption in Ontario as any other seller by wholesale or retail. The brewer, *quoad hoc*, is in the like position. The same policy, whether of police or revenue, would also equally apply.

(b) The term "licenses" is most general, and would include as a subject-matter not only all dealers in any commodity, but trades, professions and occupations.

See Baxter on Taxation (6).

(c) The rule of *ejusdem generis* is inapplicable here—first, in there being no controlling or particular classes to refer to in order to determine the like classes, to which the word "other" might be referred with any definiteness; and, secondly, because the latter words enlarge "other licenses" into all such as the legislative authority may consider necessary to the raising of a Provincial revenue.

The learned Counsel referred to the cases cited in the

(1) 4 Peters, 514, 561-3.

(2) 4 Wheaton, 316, 428.

(3) 36 U. C. Q. B. 159, 172.

(4) 9 Wheaton, 1, 203.

(5) Sec. 1068.

(6) pp. 34, 35.

judgment of Draper, C. J., in the Court of Appeal, in *Regina v. Taylor* (1); in addition to which he cited: *Fleury v. Moore et al.* (2); *Regina v. Boardman* (3); *Canada Central Railway v. The Queen* (4); *The Queen and Lougee* (5); *Sansom v. Bell* (6); *Oswald v. Berwick-on-Tweed* (7); *Reed v. Ingham* (8); *Martin v. Hemming* (9); *In re Mew* (10); *License Cases* (11); *Ward v. Maryland* (12); *The License Tax Case* (13); *Cooley v. Board of Wardens* (14); *Metropolitan Board of Excise v. Barrie* (15); *Bode v. Maryland* (16); *Nathan v. Louisiana* (17); *Commonwealth v. Hoothooke* (18); *Illinois v. Thurber* (19); *Brown v. State of Maryland* (20).

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Supposing, now, this Act is viewed as an Imperial Act, the word "other" must be accepted in its broadest sense; 2 Burns's Justice of the Peace (21); Baxter on Taxation (22); Peto on Taxation (23); Broom's Maxims (24).

The practice of the United States also may be referred to. How was this word accepted there? See Hilliard on Taxation (25); Strong on Constitutional Law, 1058; Rev. Stats. U. S. (26).

The Provincial jurisdiction over licenses is not confined to shops and places where the sale is by retail, and the true construction to be given to sub-section 9 of section 92 is, that the words "and other licenses" include the superior as well as the inferior grade of licenses.

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| (1) 36 U. C. Q. B. 218.         | (14) 12 Howard, 299.      |
| (2) 34 U. C. Q. B. 319.         | (15) 34 N. Y. R. 657.     |
| (3) 30 U. C. Q. B. 553.         | (16) 7 Gill, 326.         |
| (4) 20 Grant, 273.              | (17) 8 Howard, 73.        |
| (5) 10 C. L. J. N. S. 135.      | (18) 10 Allen, 200.       |
| (6) 2 Camp. 39.                 | (19) 13 Illinois, 554.    |
| (7) 5 H. L. 856.                | (20) 12 Wheaton, 419.     |
| (8) 3 E. & B. 889.              | (21) 30th ed., 193, 194.  |
| (9) 18 Jur. 1002.               | (22) pp. 34 and 35.       |
| (10) 31 L. J. N. S. Bkptcy, 89. | (23) p. 170.              |
| (11) 5 Howard, 504.             | (24) pp. 585, 588.        |
| (12) 1 American R. 50.          | (25) p. 49, sec. 9.       |
| (13) 5 Wallace, 463.            | (26) p. 625, sec. 3, 243. |



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Mr. Crooks, Q.C., followed on the part of the Respondent:

By the B. N. A. Act we are given a constitution similar to the English constitution. In each Province a *plenum imperium* was constituted, and not a subordinate authority, or one with only such powers as were specifically conferred. Once jurisdiction is given over a subject-matter, the power is absolute. The case of *L'Union St. Jacques de Montreal v. Belisle* (1) seems to support this view.

The only question before the court is whether the enacting body acted *ultra vires*.

By the B. N. A. Act two sovereign bodies were created, viz., the Dominion Parliament and the Local Legislatures. There is no question of the one being subordinate to the other. The Act has to be construed as an Imperial Act, and the jurisdiction given to the Local Legislatures must be absolute and complete. Assuming this, respondent contends that this statute was enacted by the Ontario Legislature in the exercise of that sovereignty.

The Provincial Legislature possesses inherent constitutional power to enact all such laws as it thinks best for the welfare of the people of the Province, and to secure this end to prohibit the sale, traffic, or disposal of spirituous liquor or other commodities which the Legislature may deem injurious. With respect to such matters its powers are as full and complete as those of the Dominion and Imperial Parliaments in relation to matters Canadian and Imperial respectively.

The principle of the *maxim salus populi suprema lex* is strictly applicable, and sustains the Provincial jurisdiction.

See Lieber's Legal Hermeneutics (2); Sedgwick on Stat. and Constit. Law (3).

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(1) L. R. 6 P. C. 31; *ante*, p. 63.

(2) Ch. 6, sec. 10.

(3) Ch. 10, p. 404 (Pomeroy's ed., 1874), and cases in note.

Lord Selborne, in the case of *L'Union St. Jacques v. Belisle* (1), puts it thus:—

“The scheme of the 91st and 92nd sections is this: By the 91st some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters except those afterwards dealt with by the 92nd section; their Lordships do not decide it, but for the argument's sake they will assume it—certain matters, being upon that assumption all those which are not mentioned in the 92nd section, are reserved for the exclusive legislation of the Parliament of Canada, called the Dominion Parliament; but, beyond controversy, there are certain other matters, not only not reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the Provincial Legislature in each Province,—among those the last is thus expressed: ‘Generally all matters of a mere local or private nature in the Province.’”

The aim of the statute here was not to interfere with the general jurisdiction of the Dominion Government.

It is not an absolute prohibition for sale generally, but only a charge when sold for consumption within the Province of Ontario. It is only when the brewer ceases to be a manufacturer and becomes a trader. If the contention of the appellant was correct, the consequence would be that the brewer could not sell by retail. *See Cooley* at p. 581; *see also Pomeroy's Const. Law*, 285 to 297, 332.

The expression “license” has not a limited application in our statutes, and wholesale traders have been obliged to take out licenses for municipal revenue (2).

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(1) L. R. 6 P. C. p. 35; *ante*, p. 68.

(2) 29 and 30 Vict. c. 51, sec. 250; C. S. U. C., 22 Vict. c. 54, sec. 246; 43 Geo. III. c. 14, secs. 2 and 7; 43 Geo. III. c. 9; 58 Geo. III. c. 6.

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The argument of the appellant, to be consistent, would have to exclude pedlars and hawkers. See *In re Duncan* (1).

This case came under the Dunkin Act, which is still in force. If municipalities have this power, surely the Provincial Parliament cannot be denied it. Licenses of any description cannot be limited by any power held by the Dominion Government. There may be here, as in the United States, two powers that may tax the same subject. See also Broom's *Maxims* (2), Maxwell on *Statutes* (3).

Mr. Bethune, Q.C., in reply :

At the time of Confederation all *wholesale* licenses had been abolished. As to the power of disallowance by sec. 56, it has principally reference to the disallowance of valid laws for political reasons.

The Dunkin Act never touched the wholesale trade of brewers, but only prevents them from selling by the glass, and this Act could not be repealed by the Local Government.

The tax is imposed upon the brewer in Ontario, and is therefore a tax upon the sale of his goods and merchandise in Ontario, which can affect the trade of the other Provinces.

RICHARDS, C. J. :—

In deciding important questions arising under the Act passed by the Imperial Parliament for federally uniting the Provinces of Canada, Nova Scotia and New Brunswick, and forming the Dominion of Canada, we must consider the circumstances under which that statute was passed, the condition of the different Provinces themselves, their relation to one another, to the

(1) 4 *Revue Leg.* 228.

(2) pp. 585, 588.

(3) pp. 292, 303.

mother country, and the state of things existing in the great country adjoining Canada, as well as the systems of government which prevailed in these Provinces and countries. The framers of the statute knew the difficulties which had arisen in the great Federal Republic, and no doubt wished to avoid them in the new government which it was intended to create under that statute. They knew that the question of State rights as opposed to the authority of the General Government under their constitution was frequently raised, aggravating, if not causing, the difficulties arising out of their system of government, and they evidently wished to avoid these evils, under the new state of things about to be created here by the Confederation of the Provinces.

In distributing the legislative powers, the B. N. A. Act declares the Parliament of Canada shall—or, as the 91st section reads :

“It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned *exclusively* to the Legislatures of the Provinces.”

And then, for greater certainty, that section defines certain subjects to which the exclusive legislative authority of the Parliament extends. Amongst other things are mentioned :

“2. The regulation of trade and commerce.

“3. The raising of money by any mode or system of taxation.”

Certain other subjects of a general and quasi-national character are then referred to and mentioned as coming within the powers of the Dominion Parliament.

The causing a brewer to take out a license and pay a certain sum of money therefor, as required by the

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Ontario statutes, is a means of raising money, and it, of course, is a tax. And there can be no doubt it is an indirect tax; and it is equally beyond a doubt that it is a means which may be resorted to by the Dominion Parliament for the raising of money. When, then, it is mentioned in the statute under consideration that the Dominion Parliament may raise money under any mode or system of taxation, and when, in the same Act, the taxing power of the Provincial Legislature is confined to *direct taxation* within the Province, in order to the raising of a revenue for Provincial purposes, it seems to me beyond all doubt (except so far as the same may be qualified by No. 9 of sec. 92) that it was introduced not to allow the Provincial Legislature the right to impose indirect taxes for Provincial or local purposes.

The fact that in most European countries, as well as in the United States and in the North American Provinces, by far the larger portion of the ordinary revenue was raised by indirect taxes, seems to indicate that the framers of the B. N. A. Act considered this so important a power that it was not intended to entrust it to the Local Legislatures. The power of taxation, being so essential to the maintenance of a Government, must necessarily be viewed as of the greatest importance to every Government, and it is mentioned as No. 3 of the powers of the Dominion Parliament, and No. 2 of the Provincial Legislatures.

Looking, then, at these provisions as they stand thus far, it would be reasonable to hold, in the absence of any other provision, that the framers of the statute did not intend that the Provincial Legislatures should have any but the power of direct taxation for raising a revenue for Provincial purposes.

It is not necessary to say much as to the effect of raising money by direct and indirect taxation. When

each inhabitant is compelled to pay a sum of money to a tax-gatherer, he knows and understands what he pays, and will no doubt look sharply after the expenditure of money so extorted from him. But when the tax is indirectly imposed, and the payer recoups himself by an extra charge for the commodity he deals in, the purchaser may buy the article or not as he pleases; the money he pays is more like a voluntary payment for what may, perhaps, be considered a luxury, and when paid he does not look so sharply into the matter as he does in the payment of a direct tax. It is therefore obvious that the Provincial Legislatures would be much more likely to exercise prudence in the character of the expenditure of money if they are compelled to raise it by direct taxation.

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Besides this, the taxation for purely local purposes before Confederation was mostly direct, whilst that for the general purposes of the Provincial Government was indirect, and generally from customs and excise. In most of the Provinces a large portion of the indirect taxes, which might be considered as arising in the particular localities and were collected through the medium of licenses, was applied to local and not general or Provincial purposes. We must assume this was known to the framers of the B. N. A. Act, and that, whilst they were in effect prohibiting the Local Legislatures from levying indirect taxes, they did not wish to deprive these Provinces or localities of the revenue which the local or municipal authorities had been for many years receiving and applying to purely local purposes. In that view, then, when framing sec. 92 of the statute, and by No. 8 providing for making laws for "municipal institutions in the Provinces," attention would be naturally drawn to the powers conferred on those bodies in the several Provinces, and the means which they had of raising money,

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and they would find that in most, if not all, of the Provinces, the amount to be paid for tavern licenses was fixed by the local or municipal authorities, and the larger portion of the money arising from that tax was applied to municipal or local purposes in contradistinction to Provincial or general purposes. If that system was to be continued it would be necessary to make special provision therefor, inasmuch as the tax by license was an indirect mode of taxation, and the Dominion Parliament was intended alone to possess it. Giving power to the Local Legislature to legislate as to "shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for Provincial, local or municipal purposes," was certainly one mode of doing this. Suppose the word "Provincial" had not been there, would not the fair meaning be that it was intended to be confined to licenses which were of a local character?—and when it appears that part of the revenue derived from the tavern and shop licenses, as in Canada, had gone into the Provincial chest, an obvious reason existed for adding Provincial to the local or municipal purposes. In the Province where the most complete system of municipal institutions existed (and which is now the Province of Ontario), the shop and tavern licenses were issued on the certificates granted under the authority of by-laws passed by the municipalities, or in cities by the Police Commissioners, and the moneys received therefor, except the amount payable to the Provincial Government by way of duty, belonged to the corporation of the municipality in which they were issued. The revenue from auctioneers' licenses was applicable to local objects. There were issued under municipal authority a great number of other licenses, including auctioneer, which were specially named and referred to in the Municipal Institutions Act, applicable to Upper Canada, then in force, to name

which minutely would have been pursuing a course not desirable or convenient to adopt in an Act of Parliament of the character of the one under consideration, but very proper in a statute establishing municipal institutions and defining their powers.

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Mr. Justice Wilson, in his very elaborate judgment in *Regina v. Taylor* (1), refers to the class of licenses which seem to have "a proper connection with and affinity to those licenses which are commonly mentioned and found along with shop, saloon, tavern and auctioneer licenses," and then mentions licenses on billiard tables, victualling houses, ordinaries, houses where fruit, etc., is sold, hawkers, pedlars, transient traders, livery stables, intelligence offices, etc.

In some of the Provinces a portion of the moneys from shop, saloon and tavern licenses (and perhaps also auctioneers' licenses) formed part of the Provincial revenue. The mentioning of these by name shews that the power to legislate as to them was intended to be given to the Local Legislatures, and thus to interfere with what would otherwise have been the exclusive right of the Dominion Parliament to legislate on the subject. These were matters in which the municipalities were peculiarly interested, and as to which the local authorities would be much more likely to work out the law in a satisfactory manner. In fact, as to the "other licenses" the Dominion Parliament would be meddling with parish business if they undertook to legislate about them. We can, therefore, see very good reasons why these licenses as to local and municipal matters should be under the control of the Local Legislatures, and equally good reasons why, as regards licenses for such matters as would be likely to affect trade and commerce and the revenue derivable from the excise and customs, these latter affecting great



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and paramount interests, no express power was given to the Local Legislatures.

It seems to me, in naming "shop, saloon and auctioneer" licenses, the intention was to shew that, as these licenses might possibly be considered applying to objects from which the Dominion revenue was likely to be derived, though really matters of local concernment, it would be better to name them and leave the other unimportant licenses to be covered by the words "and other licenses."

If it had been intended to allow the Local Legislatures to tax manufactures, and particularly the manufactures of malt and alcoholic liquors, from which so large a part of the public revenues had been, and was likely to be, raised, it would have been mentioned, and mentioned in other terms than "and other licenses."

The Province of Canada, before Confederation, being the largest territorially, having a greater population and raising a larger revenue than either of the other Provinces, and being formed by the union of two Provinces having different laws, and to some extent different interests, would naturally attract attention as the portion of the country where some of the objects of Confederation had been practically worked out. The legislation which had prevailed there would naturally be referred to, and would probably have its effect in moulding the measure which was to affect the destinies of so important a member of the new Confederacy, and which was to be worked out there in common with the other Provinces. I think we may, without violating any of the rules for construing statutes, look to the legislation which prevailed in any or all of the Provinces, in order to enable us to be put in the position of those who framed the laws, and give assistance in interpreting the words used and the object to which they were directed.

Now, in considering the meaning to be attached to the words "shop licenses" (I am not aware that they were used as applicable to licenses in any other of the Provinces), we find, on referring to the Municipal Institutions Act of Upper Canada then in force, 29 and 30 Vict. cap. 51, "shop licenses" are said to be licenses for the retail of spirituous, fermented or other manufactured liquors, in quantities not less than one quart in shops, stores, or places other than inns, ale-houses or places of public entertainment. "Tavern licenses" is a term of more general use, and probably had substantially the same meaning throughout all the Provinces, and that class of license is referred to in the same statute and section as licenses for the retail of the same description of liquors to be drunk in an inn, ale-house, beer-house, or any other house of public entertainment in which the same is sold.

The anomaly of allowing the Local Legislatures to compel a manufacturer to take out a license from the Local Government to sell an article which has already paid a heavy excise duty to the Dominion Government, and after he has paid for and obtained a license from the Dominion Government to do the very same thing, is obvious to every one. It is not doubted that the Dominion Legislature had a right to lay on this excise tax and to grant this license, and the Act of the Local Legislature forbids and punishes the brewer for doing that which the Dominion statute permits and allows. Here surely is *what seems* a direct conflict and interference with the Act of the Dominion Legislature, and such a conflict as the framers of the B. N. A. Act never contemplated or intended.

I should be very much surprised to learn that any gentleman concerned in preparing or revising the B. N. A. Act ever supposed that under the term "and other

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licenses " it was intended to confer on the Local Legislatures the power of interfering with every statute passed by the Dominion Parliament for regulating trade and commerce, or for raising money under customs and excise laws. If it be decided that the words used confer the power in the broad sense contended for, there can hardly be an occupation or a business carried on which may not need a license from the Local Legislature, and if they have the right to impose that kind of taxation, why should they be restricted from doing so ?

I have already intimated that the largest portion of the revenues of Canada will probably be derived from duties raised under customs and excise laws, and that the power of direct taxation will seldom be resorted to, but that it was undoubtedly necessary, to guard against all possible contingencies as to a deficient revenue, to give to the Dominion Parliament the power of direct taxation. It may be urged that in this way a conflict may arise between the two authorities. When a tax is directly imposed, the power imposing it authorizes its own officers to collect it ; but when the conflict arises from a license, the party who is required to take out the license may or may not do so as he pleases, and he may cease to carry on the business, and in that way deprive the Government of the revenue it would otherwise have received.

I do not think it necessary for the elucidation of my views to reiterate the arguments contained in the very elaborate judgment of Mr. Justice Wilson, in the case of *Regina v. Taylor*. That judgment was prepared when I was a member of that court, after a most careful consideration and consultation with all the judges of the court.

The fact that that judgment was reversed in the Court of Appeal of Ontario, and that so many of my learned

brothers in this court dissent from the views there expressed, of course naturally creates in my mind some distrust as to the correctness of my own conclusions. It may be that I do not take a sufficiently technical view of the matter, that I look too much to the surrounding circumstances and the legislation which I consider applicable to the subject, and that my mind is too much influenced by those circumstances. But I consider the question to be decided is of the very greatest importance to the well working of the system of government under which we now live. I consider the power now claimed to interfere with the paramount authority of the Dominion Parliament, in matters of trade and commerce and indirect taxation, so pregnant with evil, and so contrary to what appears to me to be the manifest intention of the framers of the B. N. A. Act, that I cannot come to the conclusion that it is conferred by the language cited as giving that power.

By the interpretation I give to the words, limiting them to the "other licenses" which are of a local and municipal character, and giving full force to the words "shop, saloon, tavern and auctioneer licenses," I think I carry out the intention of the B. N. A. Act, and make all the powers harmonize—those of the Dominion Parliament to regulate trade and commerce and to exercise the power of indirect taxation, except the shop, tavern, saloon and auctioneer licenses, and those of a purely local and municipal character; and the Local Legislature has the power so excepted out of the exclusive powers of the Dominion Parliament, together with the right of direct taxation.

It is suggested that as, under section 90 of the statute, the Governor-General may disallow any Act of a Local Legislature likely to cause a conflict with statutes of the Dominion Parliament, any apprehended difficulty or

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inconvenience might be avoided by the exercise of that power.

Under our system of government, the disallowing of statutes passed by a Local Legislature after due deliberation, asserting a right to exercise powers which they claim to possess under the B. N. A. Act, will always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the Act is so clearly beyond the powers of the Local Legislature that the propriety of interfering would at once be recognised.

My views may be briefly summed up thus :

I consider, under the B. N. A. Act, the power to regulate trade and commerce rests exclusively with the Dominion Parliament, as also the right to raise money by the mode of indirect taxation, except so far as the same may be expressly given to the Local Legislatures.

Making it necessary to take out and pay for a license to sell, by wholesale or retail, spirituous, fermented or other manufactured liquors, is raising money by the indirect mode of taxation.

I think all the authority given to the Local Legislatures to exercise the power of raising money by the indirect mode of taxation is contained in sec. 92 of the B. N. A. Act, which gives power to legislate on the subject of

"8. Municipal institutions in the Province.

"9. Shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for Provincial, local or municipal purposes."

Looking at the state of things existing in the Provinces at the time of the passing of the B. N. A. Act, and the legislation then in force in the different Provinces on the subject, and the general scope and object of Confederation then about to take place, I think it was not intended by the words "other licenses" to enlarge the powers referred to beyond shop, saloon and tavern licenses

in the direction of licenses to affect the general purposes of trade and commerce and the levying of indirect taxes, but rather to limit them to the licenses which might be required for objects which were merely municipal or local in their character.

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If the power can be properly exercised by the Local Legislatures to raise money by this indirect mode of taxation, I cannot doubt it will be largely exercised, and probably without reference to the effect it may have on the means which the Dominion Parliament may resort to for the purpose of raising a revenue. It is a significant fact that since the passing of the Act requiring manufacturers of spirituous, malt, or other manufactured liquors to take out a license to sell by wholesale, the Legislature of Ontario has increased the sum payable for such licenses from fifty dollars to one hundred and fifty dollars.

I think the appeal should be allowed with costs, and judgment in the court below entered for the defendant on the demurrer to the information, with costs.

RITCHIE, J. :—

The only question raised in this case is: Has the Legislature of Ontario authority to raise a revenue from brewers by requiring them to take out licenses to enable them to carry on their business and dispose of their beer within the Province of Ontario?

This I should feel no difficulty in answering in the negative but for sub-section 9 of sec. 92 of the B. N. A. Act, 1867.

No doubt this is an indirect tax, and Local Legislatures are, by the B. N. A. Act, confined in their power of raising money to direct taxation within the Province, in order to the raising of a revenue for Provincial purposes, except so far as their power is extended by section 92,

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which authorizes the Legislature in each Province exclusively to make laws in relation to matters coming within the classes of subjects next thereafter enumerated, of which sub-section 9 specifies :

“Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for Provincial, local or municipal purposes.”

This brings up the question on which, I humbly think, this case turns, viz., what licenses did the Legislature intend to cover by the words “and other licenses?” Had the licenses specified in this section been *ejusdem generis*; had they been confined to those which, throughout the Dominion, previously to Confederation, had been granted only by municipal authorities; and had the revenue authorized to be raised been for municipal purposes alone, I should have thought there was much force in the contention that the words “and other licenses” should be read in a restricted sense. We are not, in my opinion, to look to the state of the law at the time of Confederation in the adjoining Republic, or the difficulties there experienced, as affording any guide to the construction of the B. N. A. Act; nor, with all respect for the Province of Ontario, do I think the Act should be read by the light of an Ontario candle alone—that is, by the state of the law at the time of Confederation in that Province, without reference to what the law was in other parts of the Dominion. If the law at the time of Confederation is to be looked at as affording a key to the construction of the Statute, then the state of the law throughout the Dominion must, I think, be looked at, and not that of any individual Province, as I think it clear that the statute was to have a uniform construction throughout the whole Dominion, and the powers of all the Local Legislatures were to be alike. But, as the case stands, I can see no reason why the golden rule, as it has been

often called, by which judges are to be guided in the construction of Acts of Parliament, should be departed from, viz., to read the words of an Act of Parliament in their natural, ordinary and grammatical sense, giving them a meaning to their full extent and capacity, there being nothing to be discovered on the face of the statute to shew that they were not intended to bear that construction, nor anything in the Act inconsistent with the declared intention of the Legislature.

I cannot think it was intended to confine the powers of the Local Legislature, for the raising of a revenue for Provincial purposes, to licenses of a purely municipal character, granted, most frequently, rather with a view to police regulations than for purposes of revenue, and which, when granted for the latter object, could hardly be supposed to be more than adequate for local and municipal purposes. I think the power given under subsection 9 should be construed as intended to furnish the Local Legislature with the means of raising a substantial revenue for Provincial purposes from all such licenses as at the time of Confederation were granted in the now Dominion, either by Provincial or municipal authority.

I have said before, the licenses named are not *ejusdem generis*, for certainly auctioneer licenses are not *ejusdem generis* with tavern licenses, nor always granted by the same authority; for in New Brunswick, while tavern licenses were granted by the municipal authority, auctioneer licenses were granted by the Lieutenant-Governor. And so with respect to distillers, an annual license had to be obtained from the Provincial Treasurer; so also formerly with respect to hawkers, pedlars and petty chapmen, a Provincial duty was imposed, and they were required to take a license from the Treasurer of the Province (1); and again, in New Brunswick, licenses

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(1) See 9 and 10 Geo. IV. c. 27.



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other than those of a police or municipal character were granted by municipal authority as licenses for the sale of liquors by wholesale, no person being allowed to sell any liquor by wholesale without license, which liquors the statute declared *inter alia* to be :

“Ale, porter, strong beer, or any other fermented or intoxicating liquor.”

From this brewers were not exempt, there being no exception in their favour. And by the 6 Vict. c. 35, it was enacted :

“Sec. 3. That it shall and may be lawful for the mayor of the said city (St. John), and he is hereby authorized, to license persons being natural-born British subjects, or such as shall become naturalized or be made denizens, to use any art, trade, mystery or occupation, or carry on any business in merchandise or otherwise, within the said city, on paying yearly such sum, not exceeding five pounds, nor less than five shillings, to be fixed and determined by an ordinance of the corporation, for the use of the mayor, aldermen and commonalty of the said city of St. John, together with the fees of office, and be subject also to the payment of all other charges, taxes, rates or assessments as any freeman or other inhabitant of the said city may, by law, be liable to or chargeable with.

“Sec. 4. And that aliens, the subjects of any other country at peace with Great Britain, may be licensed by the mayor of the said city, to use any art, trade, mystery or occupation, or to carry on any business in merchandise or otherwise, within the said city, on paying annually, for the use of the mayor, aldermen and commonalty of the said city, a sum not exceeding twenty-five pounds, nor less than five pounds, together with fees of office to be regulated by an ordinance of the corporation, and be subject also to the payment of all other

charges, taxes, rates or assessments as any freeman or any other inhabitant of the said city may, by law, be liable to or chargeable with."

Therefore, I think the rule *noscitur a sociis* cannot apply in this case.

It is said this construction conflicts with the power of the Dominion Government to regulate trade and commerce, and the raising of money by any mode or system of taxation. All I can say in answer to that is, that so far, and so far only, as the raising of a revenue for Provincial, municipal and local purposes is concerned, the B. N. A. Act, in my opinion, gives to the Local Legislatures not an inconsistent but a concurrent power of taxation, and I fail to see any necessary conflict; certainly, no other or greater than would necessarily arise from the exercise of the power of direct taxation and the granting of shop and auctioneer licenses specially vested in the Local Legislatures. It cannot be doubted, I apprehend, that both the Local Legislatures and Dominion Parliament may raise a revenue by direct taxation, and, if so, why may not both raise a revenue by means of licenses? There need be no more conflict in the one case than in the other. The granting of shop and auctioneer licenses necessarily interferes with trade and commerce—the former with retail trade, the latter with both wholesale and retail trade; for, in large business centres, auctioneers' sales on a wholesale scale are of daily occurrence.

Should at any time the burden imposed by the Local Legislature, under this power, in fact conflict injuriously with the Dominion power to regulate trade and commerce, or with the Dominion power to raise money by any mode or system of taxation, the power vested in the Governor-General, of disallowing any such legislation, practically affords the means by which serious difficulty

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may be prevented. But I do not think we have any right to suppose for a moment that the Local Legislatures would legislate save for the legitimate purpose of raising a revenue, and not so as to interfere unnecessarily or injuriously with the legislation of the Dominion Parliament, still less so as to destroy the very business from which the revenue is to be derived.

I think the construction I have indicated of the words "and other licenses" is not only in accordance with the literal interpretation of the language, but is consistent with the policy and purview of the statute, which, as I said before, in my opinion, was to give to the Local Legislatures the rights and power, in addition to direct taxation, to raise a substantial revenue, for Provincial as well as for municipal purposes, by means of licenses such as were and might have been granted at the time of Confederation by the several Provincial Governments and municipal authorities, and is not confined to licenses which are of a purely municipal character, and from which I do not think a brewer is any more exempt than a shopkeeper or auctioneer. He could not sell by wholesale in New Brunswick at the time of Confederation without a license, and I do not think he can do so now in Ontario.

It may be right for me to say that it is only under the words "and other licenses," and solely in order to the raising of a revenue for the purpose named in sub-section 9, that, in my opinion, the Local Legislatures have the right of imposing this burden or tax on brewers.

STRONG, J.:—

I am of opinion that the judgment of the Court below ought to be affirmed.

As this Court is now, for the first time, dealing with a question involving the construction of that provision of

the B. N. A. Act which prescribes the powers of the Provincial Legislatures, I do not consider it out of place to state a general principle which, in my opinion, should be applied in determining questions relating to the constitutional validity of Provincial statutes. It is, I consider, our duty to make every possible presumption in favour of such legislative acts, and to endeavour to discover a construction of the B. N. A. Act which will enable us to attribute an impeached statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it; and in doing this, we are to bear in mind "that it does not belong to courts of justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it."

It must, therefore, before we can determine that the Legislature of the Province of Ontario have exceeded their powers in passing this Act, be conclusively shewn that it cannot be classed under any of the subjects of legislation enumerated in section 92 of the B. N. A. Act, which is to be read as an exception to the preceding section.

The provision contained in the 26th section of the Ontario Act, 37 Vict. c. 32, does not require all brewers to obtain licenses to enable them to sell the beer manufactured by them; but the restriction against selling without license is confined to the sale by wholesale of beer sold for consumption within the Province. I cannot well see with what object the distinction was made between beer to be consumed in and that to be consumed without the Province, unless it was either upon the assumption that the right exclusively conferred upon the Parliament of the Dominion to regulate trade and commerce did not extend to the internal trade of the Prov-

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inces; or upon the supposition that the law would be authorized by the right to legislate in exercise of what was designated in the argument of this case as the police power, which, it was contended, the Provinces possess. Neither of these grounds constituted valid reasons for making this discrimination.

That the regulation of trade and commerce in the Provinces, domestic and internal, as well as foreign and external, is, by the B. N. A. Act, exclusively conferred upon the Parliament of the Dominion, calls for no demonstration, for the language of the Act is explicit.

With reference to the police power, I am of opinion also, for a reason which I will state hereafter, that the distinction could have no legal effect.

I regard the Act, therefore, as one the validity of which is to be tested precisely in the same manner as if it had required all persons carrying on the trade of brewing in the Province of Ontario to qualify themselves by taking out licenses.

It was argued for the Crown, and particularly pressed by one of the learned counsel, Mr. Crooks, that the fee payable for this license was a direct tax, or in the nature of a direct tax, and so authorized by section 92, sub-section 9.

I do not think this argument well founded. It might not be easy to specify *a priori* what is meant by a direct tax under that sub-section. One species of tax which would be a direct tax suggests itself at once—a capitation tax; but it is not material to pursue the enquiry, as it is evident that, accepting the meaning given to the term “indirect tax” by political economists, a tax on manufactures by means of a license is within the definition, since the payment of it ultimately falls upon the consumer. Licenses are always classed by economists with excise taxes. The authorities referred to in the judg-

ment of the late Chief Justice of the Court of Appeal in *Regina v. Taylor* seem conclusive as to this.

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It was also contended by counsel for the Respondent, that under the words "Municipal Institutions in the Province" which constitute sub-section 9 of sec. 92, or under sub-section 16 of the same section, which gives legislative power in "all matters of a merely local or private nature in the Province," the Provincial Legislatures possess authority to legislate in exercise of what American authorities have conveniently termed the "Police power"—meaning a power to legislate respecting ferries, markets, fares to be charged for vehicles let for hire, the regulation of the retail sale of spirits and liquors, and on a number of other cognate but indefinite subjects, which, in all countries where the English municipal system, or anything resembling it, prevails, have been generally regarded and dealt with as subjects of municipal regulation. (1)

Without expressing any opinion as to the soundness of this argument, I am of opinion, that, even if it was entitled to prevail, it could not warrant the imposition of a license tax upon the manufacture or wholesale sale of beer any more than it would authorize a similar tax upon any other manufacture or commerce by wholesale.

I think, however, in ascribing the power of the Legislature to pass this statute to sub-section 9 of section 92, the learned counsel for the Crown put their case upon the true ground. That provision is in the following words:

"Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes."

In *Regina v. Taylor* (2), the Court of Appeal of Ontario,

(1) See *Munn v. Illinois*, 4 Otto, 251 et seq.; Potter's Dwarria, p. 462; Dillon on Municipal Corporations, sec. 93.

(2) 36 U. C. Q. B. 218.

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adjudicating upon the question now before this Court, determined that the words "other licenses," as used in this section, gave power to impose licenses upon persons carrying on the trade of brewers.

This conclusion was reached by the consideration that all powers conferred in section 92 were to be read and regarded as exceptions to those enumerated in section 91, and by that section given to Parliament; that section 92 was, therefore, to be construed as if it had been contained in an Act of the Imperial Parliament, separate and apart from section 91, and is, therefore, to be read independently of that section. The rule applied in the construction of statutes, which restrains general words following specific words to subjects *ejusdem generis* with those specifically mentioned, was thought not to be applicable, inasmuch as the specific words were not *ejusdem generis* with each other, and it was, therefore, impossible to say with which class of the specific classes mentioned the general words should be associated; in short, it was held to be impossible to apply to this clause the well-known maxim of interpretation *noscitur a sociis*. The words "other licenses" were therefore held to be susceptible of only one construction, that which attributed to them the same meaning as if the expression in the Act had been "any licenses," or "all licenses," standing alone unconnected with any specific words.

I was a party to the judgment in *Regina v. Taylor*, and a careful consideration since has not only not led me to discover any error in it, but has brought to my notice authorities not quoted to the Court of Appeal, as well as some additional reasons for adhering to the decision.

In *Regina v. Payne* (1) this principle of construction was applied. A recent text writer (2) gives a succinct statement of this case and of the principle involved in it,

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(1) L. R. 1 C. C. 27.

(2) Maxwell on Statutes, p. 303.

which I adopt, and which is contained in the following quotation:

"Further, the principle in question applies only where the specific words are all of the same nature. When they are of a different nature, the meaning of the general word remains unaffected by its connection with them. Thus, where an Act made it penal to convey to a prisoner, in order to facilitate his escape, 'any mask, dress or disguise, or any letter, or any other article or thing,' it was held that the last terms were to be understood in their primary and wide meaning, and as including any article or thing whatsoever which could in any manner facilitate the escape of a prisoner, such as a crowbar. Here, the several particular words 'disguise' and 'letter' exhausted whole genera, and the last general words must be understood, therefore, as referring to other genera." (1)

It is scarcely possible to suppose an authority more exactly in point than that just cited; the only difference in principle between the two cases being, that, in the instance quoted, this rule of construction was applied in a criminal case and against the prisoner; here, it was applied by the Court of Appeal in support of a presumption which the highest authorities, and which reason, if there was no authority, tell us ought always to be made in favour of the constitutional validity of a legislative act.

But without any reference to authority, the impossibility of saying by which of the particular expressions, "shop, saloon, tavern or auctioneer," the general words were to be restrained, ought, I venture to say, with deference to those who differ from me, to force the broad con-

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(1) *R. v. Edmundson*, 2 E. & E. 77; *Young v. Grattridge*, L. R. 4 Q. B. 166; *Harris v. Jenna*, 9 C. B., N. S. 152 *Pearson v. Hull Local Board of Health*, 3 H. & C. 921.



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struction of the words "other licenses," upon a court called upon to construe this clause, as a necessary and unavoidable interpretation (1).

Then, the attribution of this meaning to the clause under consideration does not lead to any harsh or unreasonable consequences. The result of it is, that the people of the Provinces have the power, through their representatives, to tax themselves for Provincial, local or municipal purposes, by means of licenses, to any extent they may choose, which may, perhaps, not be considered to be an extravagant power when it is remembered that the license tax is the only source of Provincial revenue other than the public lands, the subsidy from the General Government, and money raised by direct taxation, which, however ample in this particular Province, and at the present time, may not, in other Provinces, or in this at some future time, be productive of sufficient income to meet the expenditure required for carrying on the Provincial Government.

The imposition of licenses authorized by this subsection 9, is, it will be observed, confined to licenses for the purposes of revenue, and it is not to be assumed that the Provincial Legislatures will abuse the power, or exercise it in such a way as to destroy any trade or occupation. Should it appear explicitly on the face of any legislative act that a license tax was imposed with such an object, it would not be a tax authorized by this section, and it might be liable to be judicially pronounced *extra vires*. And however carefully the purpose or object of such an enactment might be veiled, the foresight of those who framed our constitutional Act led them to provide a remedy in the 90th section of the Act, by vesting the power of disallowance of Provincial Acts in the executive

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(1) See *Cadett v. Earle*, 5 Ch. D. 710, per Sir George Jessel, Master of the Rolls, decided since this judgment was delivered.

power of the Dominion, the Governor-General in Council. There is, therefore, no room for the application of any argument *ab inconvenienti* sufficient to neutralize the rule of verbal construction already referred to.

I have considered, with all the attention in my power, the reasoning which the Chief Justice has enunciated in his judgment to-day, as well as in his former judgment in the case of *Slavin v. Orillia* (1); but I am unable to accede to the doctrine that we are to attribute to the words "other licenses" the same meaning as though the expression had been "such other licenses as were formerly imposed in the Province," or equivalent words.

The result of such a construction would be, that the same words would have a different meaning in different Provinces, and that the several Provincial Legislatures would have different powers of taxation, though the power is included in the same grant. This, it appears to me, would be in direct contravention of the principle which forbids a different interpretation being given to a general law in different localities, however much local laws or usages may favour such diverse interpretations (2).

However, apart from authority, I cannot think this was the intention of the Imperial Parliament. I think everything indicates that co-equal and co-ordinate legislative powers in every particular were conferred by the Act on the Provinces, and I know of no principle of interpretation which would authorize such a reading of the B. N. A. Act as that proposed. Had such been the design of the framers of the Act, the meaning of which I can only discover from the words in which it is expressed, we should have found the case provided for.

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(1) 36 U. C. Q. B. 172.

(2) *R. v. Hogg*, 1 T. R. 721; *R. v. Saltren*, Cald. 444.

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The objection, that the wider construction which I have attributed to sub-section 9 brings that provision into collision with sub-section 2 of section 91, which confers the power of regulating trade and commerce on the Parliament of the Dominion, is, I think, fully answered by reading the subjects enumerated in section 92 as excepted from section 91. It is, I conceive, the duty of the Court so to construe the B. N. A. Act as to make its several enactments harmonize with each other, and this may be effected, without doing any violence to the Act, by reading the enumerated powers in section 92 in the manner suggested, as exceptions from those given to the Dominion by section 91. Read in this way, sub-section 2 must be construed to mean the regulation of trade and commerce, save in so far as power to interfere with it is, by section 92 conferred upon the Provinces. Imposing licenses on auctioneers and shops is an undoubted interference with trade and commerce; and if the words "other licenses" have the wide primary meaning which, I think, is to be attributed to them, why should they be cut down and regarded as inconsistent with sub-section 2, any more than the words authorizing specific licenses? The reading of sub-section 2 of section 91, as subject to the exception of auctioneer and shop licenses, is absolutely necessary to reconcile the two clauses; and, if that be so, upon what principle can the classes of licenses, whatever they may be, which are covered by the words "other licenses," be excluded from the exception? The words "other licenses" must either be silenced altogether, or else, whatever they may mean in conjunction with the preceding specific words, they must be read as an exception to sub-section 2 and every other enumeration of section 91, with which they would conflict if otherwise construed.

That Parliament has a general unrestrained power of

taxation can make no difference. The same answer applies to this objection as that just suggested as regards sub-section 2; but, in addition, there is no repugnancy or inconsistency between this general power of taxation in the Dominion and the restricted right to tax in the Provinces.

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It is true, that the same tax might be laid on by both Legislatures, but this constitutes no such absurd or unjust consequence as would necessitate a rejection of the obvious primary meaning of the words of the Act. If in section 91 unlimited power of taxing is given, and in section 92 power is given to tax brewers, and I read the Act as if that had been expressed in so many words, there would not, so far as I can see, be any inconsistency.

The General Legislature can undoubtedly tax auctioneers, and by express words the Local Legislature have authority to do the same. The Act, therefore, contains internal evidence that the double power of taxation was not considered inconvenient or absurd. The protection of the people against oppressive taxation was left to their representatives in the Provincial Legislatures as well as in Parliament.

Some arguments addressed to the court seem to have been intended to elicit opinions as to the locality of the power of prohibiting legislation with reference to the trade in spirituous liquors, wine and beer. This, so far as retail trade is concerned, must depend on the proper answers to two questions: 1st, Do the Local Legislatures possess what is called the "police power"? 2nd, If they do, does it authorize them to legislate so as to prohibit, or only to regulate, the retail traffic in liquors? The decision of this case does not call for any answer to either of these questions, and I therefore forbear from expressing any opinion upon them, since such an opinion

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would, in my point of view, be extra-judicial, and therefore improper.

My conclusion is, that it was within the competence of the Legislature of Ontario to pass the statute in question, and that this appeal should therefore be dismissed with costs.

TASCHEREAU, J.:—

The only question submitted for our decision is, whether the Legislature of Ontario had the power to pass the statute 37 Victoria, chapter 32, under which the Appellant was condemned, requiring brewers to take out a license for selling fermented or malt liquor by wholesale.

I must confess, that for some time I had strong doubts against the legality of the pretensions of the defendant Severn, amounting very nearly to conviction; but after long and mature deliberation I came to the conclusion that the sections of that Act applicable to the defendant were *ultra vires*.

On reference to section 92 of the B. N. A. Act, 1867, we find that the subjects of *exclusive* Provincial legislation are determined in somewhat concise language; but, nevertheless, with sufficient explicitness to be well ascertained after a careful examination of the whole Act.

On reference to sub-section 2 of section 92, we find that direct taxation only is one of the privileges of Local Legislatures, in order to raise a revenue for Provincial purposes; and under sub-section 9 of this same section 92, it is enunciated that their powers shall extend to make laws about

“Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local or municipal purposes;”  
 but it is evident, that in adjudicating on the extent of

sub-section 9 of section 92, we must read it in connection with the remainder of the Act itself, and more particularly with sub-sections 2 and 29 of section 91, which indicates the powers of the Parliament of Canada.

Under sub-section 2 of section 91, the Parliament has the exclusive regulation of trade and commerce; and under sub-section 29 of section 91, it is declared that

"Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

From section 122 of the B. N. A. Act we can safely infer that the Parliament of Canada has *exclusive* jurisdiction as to excise.

Coming to sub-section 2 of section 92 of the B. N. A. Act, I say that it is out of the question for the Crown to rest its case on this sub-section; for, according to it, the only tax the Government of Ontario could raise would be a direct one, and not an indirect one, such as the one complained of. The authorities quoted at the Bar warrant this interpretation of the nature of the tax.

"A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." (1)

Now, from what I have read and heard, I think there is no difficulty in assuming that the tax imposed on the brewer selling by wholesale in the present case, is an indirect tax, so that this question should not be further pressed against the defendant Severn.

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(1) Mill's Principles of Political Economy, Vol. II., Ed. 1871, p. 415.

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Now, can the Crown justify the Act in question in this cause under sub-section 9 of section 92 of the B. N. A. Act, which grants to Provincial Legislatures in the Dominion of Canada the right of making laws about shop, saloon, tavern, auctioneer and other licenses? I think not. This power would evidently clash with the Dominion power of regulating trade and commerce, and of imposing duties thereon, and exacting licenses. If this right existed, both Parliament and Provincial Legislatures would possess an equal right to impose a duty and exact licenses.

But what is the meaning of the words "and other licenses," immediately following the words "shop, saloon, tavern, auctioneer?" I answer, that taken in connection with all the surrounding circumstances, and with the various sections of the B. N. A. Act, they certainly cannot mean anything which could be interpreted as granting such powers as those claimed by the Ontario Legislature. They must not be so interpreted as to clash with the general spirit of that last mentioned Act and its special enactments. In a word, they cannot be so interpreted as to give to the Ontario Legislature a right to affect the general control of the Dominion over trade, commerce and excise, and its sovereignty over the country, by diminishing some of its principal sources of revenue. If these words mean what is contended for by the prosecution, sub-section 29 of section 91 of the B. N. A. Act is nonsensical, and should be struck out of the statute. But these words may and must mean all matters and regulations of Police and the government of those saloons, taverns, auctioneers, etc., etc.; and if these words cannot bear this last interpretation, the section has no meaning, or is *ultra vires*. I therefore say, that the defendant Severn could not be legally convicted under the Act in question, as he has

been by the judgment appealed from in the present case, and that that judgment should be reversed.

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[*Translated.*]

FOURNIER, J. :—

The only question to be decided in this case arises on the constitutionality of a law of the Province of Ontario, imposing upon brewers and distillers the obligation of taking out a license of \$50, in order that they may sell their products within the said Province.

The question we have therefore to consider is, whether the law in question is, or is not, in direct conflict with the B. N. A. Act, and, more particularly, 1st, with No. 2 of section 91, relating to the "regulation of trade and commerce;" and, 2nd, with section 122, which gives to the Parliament of Canada the control over the custom and excise laws, and, therefore, beyond the limits of the jurisdiction of the Ontario Legislature.

The principal provisions in the B. N. A. Act, which have reference to the present question, are the following:

Sec. 91 gives power to the Parliament of Canada

"To make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated:"

Amongst others—

"2nd. The regulation of trade and commerce.

"3rd. The raising of money by any mode or system of taxation. . . . .



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"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

"Sec. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated:"

Amongst others—

"2. Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.

"9. Shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for Provincial, local, or municipal purposes."

"Sec. 95. In each Province the Legislature may make laws in relation to agriculture in the Province, and to immigration into the Province, and it is hereby declared that the Parliament of Canada may from time to time make laws in relation to agriculture in all or any of the Provinces, and to immigration into all or any of the Provinces; and any law of the Legislature of a Province relative to agriculture or to immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada."

"Sec. 122. The custom and excise laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of Canada."

Before considering the two points above mentioned, I think it necessary to review briefly the argument of the learned counsel of Her Majesty, founded on their interpretation of the words "and other licenses," in paragraph 9 of section 92. They contend, as it was contended by the Court of Appeal of Ontario, in the case of *Regina v.*

*Taylor*, where the same question arose, that the expression made use of is large enough to give jurisdiction to the Ontario Legislature to pass the law in question.

Now, if these terms are not to have the broad signification which, at first sight, their general meaning seems to convey, what restrictions should be put on them? What subjects would be susceptible of taxation by the mode of licenses, and what subjects would be exempt from such taxation? The line of division is no doubt somewhat difficult to be drawn, in consequence of a vagueness and want of precision in drafting the paragraph in which these expressions are to be found; but the Dominion, no more than the Provinces, can increase its jurisdiction by its own legislation; and we must therefore, notwithstanding the delicacy of the task, have recourse to a judicial interpretation in order to know the limits of both powers.

Is it true, as is contended by the learned counsel of Her Majesty, that, being unable to construe the words "and other licenses" in paragraph 9 according to the ordinary rule that general words following specific words must be taken to mean something of the same kind, *ejusdem generis*, the power to impose licenses is therefore absolute and unlimited?

They lay down their proposition as follows:

"The rule of *ejusdem generis* is inapplicable here—1st, in there being no controlling or particular classes to refer to in order to determine the like classes to which the word 'other' might be referred with any definiteness; and 2ndly, because the latter words enlarge 'other licenses' into all such as the legislative authority may consider necessary to the raising of a revenue."

It is true that auctioneer licenses were for a long time regulated by a different law from that which regulated the granting of licenses for shops, taverns, saloons, etc.

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But even before Confederation the Legislature of Canada had assimilated them, at least in the Province of Upper Canada, to these other licenses, and had subjected them, with the latter, to the control of the municipalities. They had, at least for that Province, become *ejusdem generis*. In Lower Canada the revenue derived from them had ceased to be appropriated for the general use of the Government, in order to form part of the seigniorial indemnity fund, for the purpose of paying off the dues of the *censitaires* which the Government had undertaken to pay.

Without attaching more importance than is necessary to the application of the rule of *ejusdem generis*, is it not more logical to suppose that the Imperial Legislature, finding already in some of the laws these licenses treated as of the *same kind* as other licenses, did likewise, and dealt with them as belonging to the one class; and, therefore, should we not apply in construing this 9th paragraph the rule of *ejusdem generis*? Otherwise, we must come to the conclusion that the insertion of the word "auctioneer," which, no doubt, was put in to give the Local Government a further source of revenue, would have the effect of giving to the Local Legislature an unlimited power to tax by means of licenses. This cannot have been the intention of the Imperial Parliament. They cannot, by the insertion of that word, have made a provision which would have the effect of destroying the financial system of both the Dominion and the Provinces established by the Constitution. The intention was no doubt that they should have a limited signification in accordance with the distinct powers so carefully allotted to the Federal and Local Governments.

Moreover, I am far from admitting that the word "other," coming immediately after an enumeration, can

always have that broad meaning; on the contrary, I am of opinion that it should nearly always be accepted in a restricted sense, and that the cases in which its signification is absolute and unlimited are exceptional.

This is the rule as laid down by Chief Justice Erle in the case of *Williams v. Golding* (1), when construing the words "other person;" and by Lord Campbell, C. J., in the case of *Reed v. Ingham* (2), while interpreting the words "other craft."

See also the case of *East London Water-works Co. v. Mile End Old Town (Trustees)* (3); and the case of *The King v. The Justices of Surrey* (4).

Besides, if these words "and other licenses" should not be construed (which I do not admit) according to the above ordinary rule, would it follow that there is not to be found in the Constitutional Act itself, taking a general view of it, as well as of certain of its provisions, a mode of solving this question conformably to the spirit of the Act, rather than according to the views of the learned Counsel of Her Majesty?

First, was it not the clear intention of the Imperial Parliament to establish two distinct Governments, with special and exclusive powers, in order to avoid all conflict between the different authorities?

To prove this it is not necessary to refer to the circumstances before the present state of affairs. The clear and precise terms of the Constitutional Act itself are sufficient to shew this. It may be as well, however, to remark that the B. N. A. Act contains in substance hardly anything more than the Quebec resolutions, their object at that time being, most certainly, to constitute two distinct Governments with different and exclusive powers. This is also, in effect, what the new Constitution

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(1) L. R. 1 O. P. 69.

(2) 3 E. &amp; B. 889.

(3) 17 Q. B. 512.

(4) 2 T. R. pp. 504, 510.

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provides for, especially by sections 91 and 92, which distribute the legislative power to the Dominion and Provincial Legislatures.

The 91st section gives to the Federal Parliament the general power of taxation, a sovereignty over all subjects, except those specifically mentioned in section 92, as being subjects exclusively belonging to the Local Legislatures. We find, among the exclusive powers given to the Federal Parliament, the power of *regulating trade and commerce*.

This power, being full and complete, cannot be restricted, unless by some specific provision to be found in the B. N. A. Act.

For this reason, the relative position of the Provinces toward the Federal Parliament is far different from that of the States towards the United States Congress. Here the power to regulate trade and commerce, without any distinction as to interior and exterior commerce, belongs *exclusively* to the Dominion Parliament; whilst, in the United States, Congress has power only to deal with exterior or foreign commerce—commerce between the different States and that with the Indian tribes. The States, not having delegated to Congress the power of regulating interior commerce, still have power to legislate on it as they please. We should not, therefore, look to the numerous decisions rendered on the laws relating to the interior commerce as precedents applicable to the present case, but rather to the decisions given on laws passed by the State Legislatures which happened to come in conflict with the power of Congress to deal with exterior commerce.

There is a decision, rendered as early as 1827, which has always been looked upon as being the true construction of that Article of the Constitution of the United States which gives Congress power to regulate exterior

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commerce, and which is very applicable to the present case. It is that rendered in the case of *Brown v. The State of Maryland* (1). In order to raise revenue to meet the expenses of the State, the Legislature of Maryland passed a law by which, amongst other things, importers of foreign merchandise enumerated in the law, or such other persons as should sell by wholesale such merchandise, were directed to take out a license, for which they were to pay \$50, before selling any of the imported goods, subjecting them, in case of neglect or refusal, to forfeit the amount due for the license and to a penalty of \$100.

Brown, who was an importer residing in the city of Baltimore, refused to pay this tax, and an information was, in consequence, laid against him before the State Court, which declared the law to be valid, and condemned him to pay the penalty prescribed.

This judgment was appealed by means of a writ of error to the Supreme Court, which court, for the reasons so ably propounded by the learned Chief Justice Marshall, declared the law void as coming in conflict with the power of Congress to regulate exterior commerce.

The question here naturally arises, what was the extent of that power? This question was considered at great length in the case of *Gibbons v. Ogden* (2), by Chief Justice Marshall, who answered it as follows:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."

Since this is the law in the United States, there is an additional reason why it should be so declared here,

(1) 12 Wheaton, 419.

(2) 9 Wheaton, 1,196.

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where our Constitution does not acknowledge, as in the United States, a division of power as to commerce.

The law declared void in the case of *Brown v. The State of Maryland*, was of the same kind as the one enacted by the Province of Ontario. The only difference was that that law reached the importer, whilst the law under consideration here is directed against the manufacturer.

But is there not a perfect analogy between the two parties? Have not both the importer and the manufacturer the one object, viz., to sell their goods? Both—the first by purchasing in a foreign market, the latter by his industry—have filled their stores with goods which they cannot put into commercial circulation until they have paid the duties imposed upon them.

The importation of foreign goods, no doubt, is subject to the regulations of trade and commerce, but not more so than manufactured articles which are subject to the excise laws. If the Local Government have the right to tax the latter, they have the same right to tax the importer, by prohibiting him, as it is contended they have the right to prohibit the manufacturer, from selling his merchandise if he has not previously taken out a license allowing him to sell.

If this contention is well founded, the payment of the custom and excise duties would not be all that the importer and the brewer would have to calculate upon before offering their goods for sale, for they would also have to pay another duty in the shape of a license fee.

It is also contended, that in this case the Federal Government having regulated only the manufacture of the beer, it was in the power of the Local Government to regulate its sale.

The following answer could be made to this argument, viz.: That if the Federal Government, in the exercise

of its power, has not deemed it necessary to restrict the sale of beer, it was because its intention was to leave it free. The regulations need not consist only of restrictions. By imposing those mentioned in 81 Vict. cap. 8, was it not in effect enacting that there should be no others? To leave or to declare free a commerce, is it not exercising the power of regulating such commerce just as much as to impose upon it certain restrictions? To impose upon beer consumed in the Province of Ontario a tax which is not imposed upon beer consumed in the other Provinces, is to decree that there shall be a difference of price in favour of consumers of beer in the other Provinces against consumers in Ontario. It is regulating that commerce in such a way as to give to the first named an unjust preference which the Federal Government itself could not give without violating the principles upon which assessments are made. It would be strange, indeed, if the Legislature of Ontario, by assuming this jurisdiction under the pretence of its being a license, could have over this matter more power than has the Federal Government.

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The power to tax is no doubt necessary to the existence of the Local Governments, but it is limited and proportioned to the extent of their jurisdiction. Fulfilling only certain duties of a Government within certain limits, the power to tax was in consequence divided between the Federal and Local Governments. To the first, whose jurisdiction is larger, belongs the power of raising money by all modes of taxation, whilst Local Governments can only do so by direct taxation (1) and by the issuing of licenses. Moreover, the tax imposed in the shape of a license by the law of Ontario on the sale of beer which has not yet been taken away from the

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(1) B. N. A. Act, 1867, sec. 92, par. 2.



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stores of the brewer, is an indirect tax which must be borne by the consumer (1).

This new tax no doubt would have, as had the previous ones, to be added to the original cost of the beer, in order that it may be paid by the purchaser. With such means at their disposal, the Local Governments might control and regulate commerce and impose indirect taxes with as great security as if the power to do so was given to them instead of being specially taken away. Such a law comes certainly in conflict with the power of the Federal Government to regulate trade and commerce, and to impose indirect taxes.

If it should be admitted that the different Governments have concurrent power to impose taxes on the commodities subject to excise, who could draw the line where each Government would have to stop? If this power belongs to the Local Government, the exercise of that power must be complete, and be made use of according to the best of their judgment whenever the raising of money would be necessary. Now, in exercising such a power, might it not happen that the taxes imposed would be so high as, practically, to considerably diminish, if not exhaust, this source of revenue? What would then be the position of the Federal Government? How could it meet its obligations? Were not the duties of customs and excise left to the Federal Government, from which source it collects the largest part of its revenue, in consequence of having to bear the public debt of the Provinces and the expenses of a General Government? Could we, without violating the Constitutional Act, alter this position? To declare that both Governments have an equal right to legislate on these sources of revenue would place the Federal Government in the impossibility

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(1) See McCulloch on Taxation, pp. 1, 147, 242, 321; also Mill's Principles of Political Economy, Ed. 1872, pp. 495, 496, 505.

of meeting its obligations towards its creditors. By appropriating this revenue to other purposes, it would in fact be diminishing the security on which these creditors, when the Constitution was adopted, had the right to count for the repayment of their advances. Legislation which would transfer to the Provincial Legislatures the control over these sources of revenue could not fail to considerably embarrass the Federal Government, and at the same time effectively affect its credit.

It must also be remembered, that under our actual political system the Dominion, having taken upon itself the burden of the Provincial debts, the Provinces, when Confederation was established, found themselves with a blank sheet on the debit side of their account, whilst there remained to their credit the Crown lands, the Federal subsidy, the power of direct taxation, and lastly, the *limited* power, in my opinion, to raise a revenue by means of licenses. A construction which would, moreover, give them the almost unlimited power of indirect taxation concurrently under the pretext of its being a license, would, no doubt, be the means of promptly and surely creating disorder and finally break up the Constitution. As soon as there should be confusion with regard to these sources of revenue, there would remain no more reason for a division of the legislative powers between the Federal and Local Governments. The confusion of the revenues would inevitably result in a fusion of the Governments. It would be the downfall of the present structure, built with such care.

Fortunately, however, such a calamity is not to be feared, for the Constitution, in my opinion, contains no provision which can have the effect of bringing about such dangerous consequences. The prudence of the Legislature, in giving to each Government special legislative powers, has averted such a danger. Each Govern-

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ment has legislative authority over certain subjects, and it is only over these subjects that each can exercise its powers. With the exception of agriculture and immigration, there is no subject-matter over which there can exist concurrent powers of legislation (1); and even then, should there be conflict, the authority of the Parliament of Canada is supreme.

By the remarks which I have just made on the consequences of the adoption of the construction contended for by the Respondent, I do not mean to argue that the exercise, nor even the possibility of abusing this power to tax by license, is a reason why it should not exist, for we can abuse all things. The proper way, no doubt, of solving this question is by referring to the express terms used in the Constitutional Act. But the clauses already cited shew clearly to whom belongs this power assumed by the Ontario Legislature. The only reason for making these observations was to shew that the interpretation adopted by the Respondent would create a state of things quite different from that which the Imperial Parliament intended for us when they passed the B. N. A. Act.

Nevertheless, I will add in support of my mode of reasoning, a passage from Chief Justice Marshall's opinion in the case of *Brown v. The State of Maryland* (2), and I also contend that in this case we should apply this ordinary rule of construction, that when a law is doubtful or ambiguous, it should be interpreted in such a way as to fulfil the intentions of the Legislature, and attain the object for which it was passed. Marshall, C. J., says:

"We admit this power to be sacred (the State power to tax its own citizens, or their property within its territory), but cannot admit that it may be used so as to obstruct the free course of a power given to Congress.

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(1) B. N. A. Act, 1867, sec. 95.

(2) 12 Wheaton, 419, 448.

We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the General and State Governments as a vital principle of perpetual operation. It results necessarily from this principle, that the taxing power of the States must have some limits. It cannot reach and restrain the action of the National Government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it from one State to another for purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up and considered with great attention in *McCulloch v. The State*

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of *Maryland* (1), the decision in which case is, we think, entirely applicable to this."

The reasoning of the Supreme Court in that case, under a system of government which left to the States the regulation of the interior commerce, is not only applicable to the present question, but should have more weight from the fact that under our system the Federal Government has the *exclusive* power over commerce.

But, secondly, this statute of the Province of Ontario not only comes in conflict with paragraph 2 of section 91, relating to the regulation of trade and commerce, but also with sec. 122 of the B. N. A. Act, giving to the Federal Government the power to regulate all matters of excise. The trade of brewing, here as well as in England, has always been regulated by the excise laws. Before Confederation the same state of things existed in all the Provinces of the Dominion. Under the new *régime* this trade is still regulated by the excise laws, which, as we have seen by section 122, already cited, are subject to federal legislation. It is true this section does not, as do section 91 and 92, positively declare that it is an exclusive power, but, as it is given without any restriction, it can only be possessed by the Federal Government. The very fact of this power not being comprised in the enumeration of exclusive powers given to the Local Governments, takes away from them all jurisdiction over this matter. It is for this reason, no doubt, that on the 21st December, 1867, the Parliament of Canada, exercising the power which it had by sec. 122, abolished all the excise laws of Canada, as well as those of the Provinces of Nova Scotia and New Brunswick, and regulated, at the same time, by a very complete law, this important trade in its most minute details.

Section 8 of 31 Vict. c. 8, declares :

"From and after the passing of this Act, no person, except such as shall have been licensed as herein provided, shall carry on the business or trade of a distiller, or brewer, or maltster, or of a manufacturer of tobacco, or use any utensil, machinery or apparatus suitable for carrying on any such trade or business subject to excise."

Section 26 imposes on the brewer the obligation of taking out a license, the price of which is fixed at \$50, in order that he may carry on his trade. He is also subject to a tax of one cent per pound of malt used in the brewery. In addition to this, he is subjected to a severe superintendence in all his operations, of which he is bound, under pain of heavy penalties, to render a minute account to the Inland Revenue Department.

This is certainly a trade, a commerce, over which the Federal Government has fully exercised its exclusive power of regulation. Can it be said after this, that because this statute only regulates the manufacture of the beer, the Provinces are still at liberty to prevent its sale until a license fee of \$50 is paid, as directed by the 23rd section of the Ontario Act? Should a brewer, after having paid to the Federal Government the duties above mentioned, and after being obliged to submit to numerous and inconvenient restrictions, still find himself in the strange position of not being allowed to take his products out of his stores? The agent of the Local Government would have the right to appear and say to him: The Federal Government can very well allow you to manufacture, but my Government will not allow you to sell unless you purchase from us, by paying a \$50 license fee, the right of selling. Would not such a prohibition be clearly contrary to the Act of the Federal Parliament authorizing the brewer to manufacture? Can you give him the right to carry on his trade in virtue of the license fee paid to the Federal Government,

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without, at the same time, giving him the right to sell the products of his trade? Do manufacturers manufacture for the sole pleasure of accumulating their products in their stores? Is not the manufacturer's sole aim to sell his manufactured articles? and does not the right to manufacture necessarily imply the right to sell? Here, again, the reasoning of Chief Justice Marshall, on the right to import, in the case already cited (1), is applicable:

"We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable. . . .

"The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce."

The power to authorize the manufacture of an article must necessarily imply, as does the right to import, the right to sell. I am therefore of opinion, that the law of Ontario in prohibiting the sale of beer, unless the party complies with its exactions, comes in conflict with the 122nd section giving to the Federal Government the power over excise.

Now, the tax imposed by the Act in question, it is true, is only \$50, but it might as well have been \$500. If the Legislature have the right to impose this tax, the power must be plenary, and would be exercised according to their judgment and whenever the necessity of increasing the revenue arose. Already, since assuming this jurisdiction, the Legislature has increased the tax from \$50 to \$150, and if the power exists nothing could prevent them from fixing the amount so high as to virtually

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(1) *Brown v. The State of Maryland*, 12 Wheaton, 419, 448.

render impossible the collection of the excise duties on this article.

Moreover, if this law relating to brewers and distillers is legal and constitutional, there can be no doubt that a law could be passed reaching the manufacturer of tobacco, of coal oil, of vinegar, in fact of all articles subject to excise. The Local Government could even go further, and under the shape of a license reach the importer in the same manner as the brewer.

If there was concurrent jurisdiction, what would happen when the collector on the part of the Federal Government would come to seize for arrears of taxes? Let us suppose that the collector of the Local Government has anticipated him, and for duties which were owing to his Government had seized and closed the brewery. He is the first on the spot, and, if he exercises a legitimate power belonging to his Government, he has the right to forbid the federal officer to come within the brewery. This latter officer, however, in virtue of the Dominion statute, has the most plenary powers; at all times he has access to the brewery. A conflict of authorities would necessarily take place; which authority should yield? For my part, not believing in the legal possibility of such a conflict, I need not seek for the means of avoiding it.

But the learned Counsel of Her Majesty, whose argument, should it prevail, would inevitably bring about this conflict, believe, that with the aid of the right of veto which belongs to the Federal Government, all interests might be conciliated, and the above inconvenient results avoided. The difficulty, they say, would be easily settled. The Constitution, by giving the right of vetoing Provincial legislation, has prudently given the means, if not to prevent, at least to put a stop to such conflicts of authorities. Such a law would be directly

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opposed to the interests of the Federal Government, and they would be justified in disallowing it by exercising their right of veto.

No doubt this extraordinary prerogative exists, and could even be applied to a law over which the Provincial Legislature had complete jurisdiction. But it is precisely on account of its extraordinary and exceptional character that the exercise of this prerogative will always be a delicate matter. It will always be very difficult for the Federal Government to substitute its opinion instead of that of the Legislative Assemblies in regard to matters within their province, without exposing themselves to be reproached with threatening the independence of the Provinces.

What would be the result if the Province chose to re-enact a law which had been disallowed? The cure might be worse than the disease, and probably grave complications would follow.

It cannot, therefore, be argued, that because this right exists we must adopt an interpretation which would lead to the necessity of having recourse to it.

Before concluding my remarks, I wish to add a few words with regard to three of the principal points of argument relied on by the learned counsel for Her Majesty in support of the validity of this law. They contend they can justify the law, 1st, by the inherent constitutional power which the Local Legislatures, they say, possess to make laws for the general welfare of the people of the Province; and that, to give effect to their purport, they have the power to prohibit the sale of spirituous liquors and of such other articles as might be considered injurious; that is to say, that in order to exercise this power, they have jurisdiction over this matter; 2nd, by paragraph 18, section 92, relating to property and civil rights in the Province; 3rd, by paragraph 16 of the same

section, giving them jurisdiction generally over all matters of a merely local or private nature in the Province.

In my above observations on the division of the legislative powers, I believe I have answered the argument of that plenary power, *plenum imperium*, which the learned Counsel contend the Local Governments possess. I will only add, that while there can be no question of their exercising the police powers, the license imposed by this law is evidently exacted for the purpose of raising a revenue. In support of the view I take with regard to the nature of this license, I will cite Cooley on Constitutional Limitations (1):

“License laws are of two kinds: those which require the payment of a license fee by way of raising a revenue, and are, therefore, the exercise of the power of taxation; and those which are mere police regulations, and which require the payment only of such license fee as will cover the expenses of the license and of enforcing the regulation.”

Nor can the fact that the Local Government has the power over property and civil rights be relied on. The passage I have quoted above from Chief Justice Marshall's opinion in reference to the State power over property and civil rights is such a complete answer to this point that I need but refer to it.

As to the third point, that it affects a matter purely local and private in the Province, I think I have also proved that this argument cannot apply in this case. The license imposed by this law is of a nature to affect all the Provinces, and it amounts in reality to an exercise of the power of regulating commerce.

For these reasons, I have come to the conclusion that the law under consideration is *ultra vires*. These reasons can be summed up as follows:

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1st. The law in question is void because it comes in conflict with the power of the Federal Parliament to regulate trade and commerce under paragraph 2, sec. 91.

2nd. Because the words "and other licenses," in paragraph 9, sec. 92, are limited by the interpretation to be given to paragraph 2 of section 91. In order to conciliate these two provisions, the words "other licenses" must be read as if they were followed by these words: "not incompatible with the power of regulating trade and commerce."

3rd. Because the tax imposed by this Act is an indirect tax which the Local Government has no right to impose.

4th. Because it comes in direct conflict with the 31 Vict. c. 8, relating to excise.

HENRY, J.:—

The information in this case charges the Appellant with a breach of the Act of Ontario, 37 Vict. cap. 32, for having sold by wholesale a large quantity of fermented liquors which he had manufactured, he (the Appellant) then being a brewer licensed by the Government of Canada for the manufacture of fermented, spirituous and other liquors. To this information the Appellant demurred, and assigned as one of the grounds of demurrer that the Legislature of Ontario had no power to restrict by an Act the sale of such liquors; or to impose a penalty for a breach of the restrictive provisions of the Act by a brewer duly licensed by the Government of Canada. This ground of demurrer was fully argued before us, and we, having fully considered it in all its bearings and consequences, have now to give judgment upon it.

The constitutionality of the Act of Canada, 31 Vict. cap. 8, under which the Appellant was licensed, is

admitted, and it is therefore necessary only to consider whether, in view of that Act, the Legislature of Ontario had power to pass an Act requiring a brewer, holding a license under the first-mentioned Act, to take out another license, and pay an additional fee, or, in the event of his not doing so, to subject him to penalties, to such an extent even as might effectually render practically useless his license from the Dominion Government. The Ontario Act in question, sec. 24, provides :

"No person shall sell by wholesale or retail any spirituous, fermented, or other manufactured liquors, within the Province of Ontario, without having first obtained a license under this Act authorizing him to do so, &c."

Sec. 25 :

"No person shall keep or have in any house, building, shop, eating-house, saloon, or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented or other manufactured liquors for the purpose of selling, bartering or trading therein, unless duly licensed thereto under the provisions of this Act."

Sec. 26 recognizes the validity of the licenses granted by the Government of Canada, and provides that sections 24 and 25 shall not prevent any brewer, distiller or other person so licensed

"From *keeping*, having, or selling, any liquor manufactured by him, in *any building wherein such manufacture is carried on*, etc. . . . Provided that any such brewer, distiller, or other person, is further required to first obtain a license to sell by wholesale under this Act the liquor so manufactured by him when sold for consumption within this Province, etc."

Sec. 22 fixes the wholesale license fee at fifty dollars for Provincial purposes.

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By sec. 4, "wholesale" is defined to be over five gallons, or one dozen bottles of three half pints, or two dozen of three-fourths of a pint each.

This Act came into operation on the 24th of March, 1874.

Under the Dominion Act, 31 Vict. cap. 8, before mentioned, the licenses expired on the thirtieth of June of each year, and those granted after the thirtieth of June, 1873, were current when the Ontario Act came into operation. Up to the passing of the latter Act a brewer had, by the effect of his license from the Dominion Government, the right, not only to *keep* and *have* for sale, but to *sell* fermented liquors by wholesale. By the latter Act he is not only prohibited from selling, but from *keeping* or *having*. Does not that Act, therefore, virtually repeal, if effect be given to it, the Dominion Act in both respects, unless, indeed, the brewer should comply with its exactions? What, in the case of his refusal to accept further conditions to his compact with the Dominion Government, would become of his manufactured stock on hand? The selling and *keeping*, or *having* on hand for sale, or for consumption, in Ontario, was prohibited, and his *keeping* or *having* it legally, after the passing of the Act, is made *contingent* on his taking out a license *under it*. He had legally accumulated a large stock, which by the Ontario Act he is forbidden either to *keep* or *sell* in pursuance of his rights under the license from the Dominion Government. It may be said the extra tax was a light one. No matter how light, it was in contravention of the rights he had acquired; and if the power to change the existing relations be at all admitted, the *extent* of the change cannot be questioned; for that is a question of expediency and parliamentary discretion, which no court could control or interfere with; and the same power which levied a contribution to the

extent of fifty dollars might raise it so high as to break up the manufacture altogether, and thus indirectly render nugatory the Dominion Act and deprive the Government of the revenue it would otherwise receive; and, consequently, as I take it, restrict the effect of the Imperial Act, section 91, sub-sections 2 and 8, which give to the Dominion Parliament the exclusive right of legislation in regard to "the regulation of trade and commerce" and "the raising of money by any mode or system of taxation."

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If, indeed, it were contended that the Dominion Act was *ultra vires*, and that the right to provide for the licenses in question was one wholly with the Local Legislature, I could appreciate the contention to some extent; but when the constitutionality of that Act is admitted, I must have better reasons than I have yet heard to induce me to conclude that the Imperial Parliament intended that *both* Legislatures should have power to deal with the same subject. Under the two sub-sections just quoted, and the Dominion Act, the power of the Dominion Government to grant the licenses in question must be admitted, and even if the right of the Local Legislature should have strong reasons to sustain it (which, however, I cannot see), but which, nevertheless, leave it a matter of doubt and speculation, I feel that it is incumbent on us, for many good reasons, to resolve that doubt against that claim of right. Suppose every Local Legislature in the Dominion were thus to interfere with the proper results to be expected from Dominion legislation in regard to this subject (and if one can do so, why not all?), who can measure or estimate the extent to which "trade and commerce" might be affected and the revenues of the Dominion diminished, its power to raise "money by any mode or system of taxation" seriously curtailed, and the customs and

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excise laws of the Dominion, passed as provided by sec. 122 of the Imperial Act, interfered with and rendered nugatory? If the right to legislate as to licenses for brewing be admitted, why not as to licenses to manufacture tobacco and everything else?

The contention on the part of the Respondent is, that both Legislatures have power under the Imperial Act to legislate in regard to the matter before us. While all admit the legislative right of the Dominion Parliament, the power of the Local Legislature is denied. The claim for it has been urged on several grounds, one of which is, that direct taxation for Provincial purposes is given exclusively to the Local Legislatures, and that the license duty sought to be levied by the Act of Ontario is a direct tax. I must dissent from that proposition, for reasons too well understood to require me to define what a direct tax is, or to shew that the imposition in this case is clearly an indirect one.

The legislative power given to the Dominion Parliament is unlimited

"To make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces," and we need not necessarily consider the provisions of sub-sections 2 and 3 of section 91.

*Everything* in the shape of legislation for the peace, order and good government of Canada is embraced, except as before mentioned. But sub-section 29 goes further, and provides for exceptions and reservations in regard to matters otherwise included in the power of legislation given to the Local Legislatures, and also provides that:

"Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to

come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

"The regulation of trade and commerce" and "the raising of money by any mode or system of taxation" are, however, specially mentioned, and both include the right to make and have carried out all the provisions in the Dominion Act. This position has not been, and cannot be, successfully assailed. The subjects in all their details of which trade and commerce are composed, and the regulation of them, and the raising of revenue by indirect taxation, must, therefore, be matters referred to and included in the latter clause of sub-section 29, before mentioned, and if so,

"Shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Every constituent, therefore, of trade and commerce and the subject of indirect taxation, is thus, as I submit, withdrawn from the consideration of the Local Legislatures, even if it should otherwise be *apparently* included. The Imperial Act fences in those twenty-eight subjects wholesale and in detail, and the Local Legislatures were intended to be, and are, kept out of the inclosure, and when authorized to deal with the subject of "direct taxation within the Province," as in sub-section 2 of section 92, and "shop, saloon, tavern, auctioneer, and other licenses," they are commanded, by the concluding clause of sub-section 29, sec. 91, not to interfere by measures for what they may call "direct taxation," or in regard at least to "other licenses," or in reference to "municipal institutions," with the prerogatives of the Dominion Parliament as to the "regulation of trade

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and commerce," including "Customs and Excise laws" and "the raising of money by any mode or system of taxation." I have already shewn, that the exercise of the power contended for by the Legislature of Ontario is incompatible with the full exercise of that of the Dominion Parliament, and might be used to its total destruction. The object of the Imperial Act was clearly to give plenary powers of legislation to the Dominion Parliament with the exception before stated, and just as clearly to restrict local legislation so as to prevent any conflict with that of the former in regard to the subjects with which it was given power to deal.

The "excise laws" of the Dominion must be affected by an additional license fee being exacted by the Local Government. The "excise" revenues belong solely to the Dominion Government. The Dominion Parliament having imposed a license fee of \$50 on a brewer of fermented liquors, might, at an early future, desire to impose for revenue a higher fee. It has the acknowledged right to do so; but, in the meantime, the Local Legislature has fully weighted the enterprise of brewing, and the result becomes, therefore, a transfer from the sources of Dominion revenue to the coffers of the Local Government. Who can say, then, that there is not an attempt to collect Provincial revenue from a source clearly appertaining to the Dominion?

But we are asked to hold that, under sub-section 9, "shop, saloon, tavern, auctioneer, and *other licenses*" will include licenses to brewers, in the position occupied by the Appellant, to sell by wholesale. Such an application can only be made by virtue of the concluding words: "and *other licenses*." The extent and limit to be given to those words have not been stated or referred to; but some must exist to their application. If applicable to *brewers' and distillers' licenses*, which, at the date of the

Imperial Act, were completely out of reach of any municipal control, why not extend them to other traders? If uncontrolled, a Local Legislature might organize a *system of licenses*, and indirectly not only tax, but regulate and restrict certain industries, trades and callings, or might, indeed, virtually prohibit and destroy them. We must reasonably conclude the Legislature meant to restrict the power at some point, and we must determine where that restriction should be imposed, not only from the words of the sub-section in question, but from the tenor and bearing of the whole Act, the state of the law at the time, the peculiar position of the United Provinces and the object of their Union, with the means for working out the Constitution provided.

Taking the words themselves, what is the law as to the construction of them? From a review of all the cases cited, and others, I am forced to conclude that the words "and other licenses" must be restricted. We find them preceded by the words "shop, saloon, tavern, auctioneer," and I cannot decide that brewers or distillers are *ejusdem generis* with them or any of them. That they should be, to include the right of legislation claimed, taking the whole of the Imperial Act together, is a position too clearly established to be doubted. In *Reed v. Ingham* (1), the law is clearly stated by Lord Campbell, C.J., and also in *East London Water-works Co. v. Mile End Old Town (Trustees)* (2). In the latter case the word "tenements" had to receive a construction. Referring to it, Lord Campbell said "tenements" must be understood according to the antecedent enumeration, and as comprising only matters *ejusdem generis*. That rule of construction was followed in *Rex v. The Manchester and Salford Water-works Company* (3), which is admitted to have been well decided. Coleridge, J., in the same case says:

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(1) 3 E. &amp; B. 889.

(2) 17 Q. B. 512.

(3) 1 B. &amp; C. 630.

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"If the Appellants are liable, it is because they occupy a tenement which is ratable. It is admitted that the word cannot have its full meaning in either place where it occurs in the section 80. In the first, it clearly means something inhabited or belonging to a dwelling. In the second, where it is admitted that some restraint must be put upon the construction of the word, *the rule attaches, that a general word following specific ones must be taken to mean something of the same kind.*"

A similar construction was put upon general words in *Sandiman v. Breach* (1). The 29 Car. 2, cap. 7, provided that

"No tradesman, artificer, workman, labourer, or other person or persons should work at their ordinary calling on the Lord's day."

Per Lord Tenterden :

"It was contended that under the words 'other person or persons' the drivers of stage coaches are included. But where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*.

"We think the words 'other person or persons' cannot have been used in a sense large enough to include the owner and driver of a stage coach."

I feel bound, therefore, on principle, and as the result of all the cases, to construe the words in question as controlled by the other portions of the Act, and therefore, not to include power to the Legislature of Ontario to legislate for licenses to brewers or distillers to sell by wholesale.

I will not, however, say that where the terms used are exhaustive of the particular class or subject named, we are bound to apply the principle of construction just stated; and it may possibly be argued that such is here

the case in respect of the words preceding "and other licenses." In such a case, where there are no controlling conditions, the words might be sufficient to give the right claimed for the Local Legislature; but when considering the objects and purview of the whole Act, and the mode provided for effecting them, I can come to no other conclusion than one founded upon the duty I feel incumbent upon me, of reading the whole Act together, and therein and thereby, and not from the technical reading of a few words in a sub-section, however otherwise important, seek for the intention and meaning of the Legislature. By this mode the Act is made to harmonize in all its parts, and the feasibility of working it out is established. By the other construction, and not in my view the proper one, the evident intention of the Legislature is frustrated, and the legislation itself made absurd and inconsistent, and the working out of the details made most difficult, and, it may be found, totally impossible. I am of opinion, for these reasons, that the Act of Ontario in question was *ultra vires*, and that the appeal should be allowed with costs and judgment entered for the Appellant.

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*Appeal allowed with costs.*

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## SUPREME COURT OF CANADA.

1879\*  
 Jan. 30;  
 Nov. 4.  
 —

PETER H. LENOIR *et al.*.....*Appellants,*  
 AND  
 JOSEPH NORMAN RITCHIE.....*Respondent.*

*On appeal from the Supreme Court of Nova Scotia.*

[*Reported 3 Can. S. C. R. 575.*]

*Powers of Local Legislatures—Queen's Counsel, Power of Appointment of.*

A Provincial Legislature has no power to authorize the Lieutenant-Governor to appoint Queen's Counsel, or to grant to any member of the Bar a patent of precedence in the courts of the Province. (Henry, Taschereau and Gwynne, JJ.)

The question arose on an appeal by a Queen's Counsel appointed by the Governor-General, the Respondents being persons appointed by the Lieutenant-Governor under Acts of the Provincial Legislature; and Strong, Fournier and Taschereau, JJ. were of opinion that the Provincial Acts of which the appellant complained were not intended to affect the precedence of Queen's Counsel appointed by the Governor-General; and it was therefore held,

Per Strong and Fournier, JJ.,—That as this court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question.

Appeal from a Rule of the Supreme Court of Nova Scotia made on the 26th March, 1877, ordering that the rank and precedence granted to Joseph Norman Ritchie, Esquire, the respondent, be confirmed, and that he have rank and precedence in the said Supreme Court over all

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\* Present:—Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

Queen's Counsel appointed in and for the Province of Nova Scotia since the 26th day of December, 1872.

The following are the material facts of the case :

The respondent, a barrister of the Province of Nova Scotia, was appointed to be one of Her Majesty's Counsel learned in the law, in and for the Province of Nova Scotia, on the 26th December, 1872, by Letters Patent under the Great Seal of Canada.

On the 7th May, 1874, the Legislature of Nova Scotia passed an Act whereby it was declared and enacted that it was, and is, lawful for the Lieutenant-Governor, by Letters Patent under the Great Seal of the Province of Nova Scotia, to appoint from among the members of the Bar of Nova Scotia such persons as he may deem right to be, during pleasure, Provincial officers under the name of Her Majesty's Counsel learned in the law for the Province of Nova Scotia (1).

On the same day the same Legislature passed another Act, entitled "An Act to regulate the precedence of the Bar of Nova Scotia" (2).

By the first section of this Act it was enacted that the following members of the Bar should have precedence in the following order: The Attorney-General of the Dominion of Canada, the Attorney-General of the Province, members of the Bar who were before the 1st July, 1867, appointed Her Majesty's Counsel for Nova Scotia, so long as they are such Counsel, according to such seniority of appointment as such Counsel.

The second section is as follows: "Members of the Bar from time to time appointed after the 1st July, 1867, to be Her Majesty's Counsel for the Province, and members of the Bar to whom from time to time Patents of Precedence are granted, shall severally have such precedence in such courts as may be assigned to them by Letters

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Patent, which may be issued by the Lieutenant-Governor under the Great Seal of the Province."

The third section enacts "that the remaining members of the Bar shall, as between themselves, have precedence in the courts in the order of their call to the Bar."

The fourth section preserves the right and precedence of Counsel acting for Her Majesty or for the Attorney-General in any matter depending in the courts in the name of Her Majesty or of the Attorney-General. On the 27th May, 1876, Letters Patent, under the seal used as the Great Seal of the Province, were issued by the Lieutenant-Governor of Nova Scotia, appointing Appellants, together with other barristers, "to be, during pleasure, Provincial officers under the name of Her Majesty's Counsel learned in the law for the Province of Nova Scotia." The patent was as follows :

<p>"DOMINION OF CANADA, }          PROVINCE OF NOVA SCOTIA. }          [L.S.]          (Sgd.) ADAMS G. ARCHIBALD.</p>	<p>"VICTORIA, by the          Grace of God, of the          United Kingdom of          Great Britain and Ire-          land, Queen, Defender          of the Faith. To all          to whom these presents shall come. Greeting :</p>
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"Whereas, under and by virtue of the provisions of chapter 20 of the Acts of 1874, entitled 'An Act respecting the appointment of Queen's Counsel,' we have thought fit to nominate and appoint certain persons, being members of the Bar of Nova Scotia, to be our Counsel learned in the law ;

"Now know, that we have appointed and do hereby appoint Henry A. Grantham, Hon. Philip Carteret Hill, Peter H. Lenoir, Hon. Mather Byles Des Brisay, Hon. Daniel McDonald, J. R. Shannon Marshall, Robert G. Haliburton, Hon. Otto S. Weeks, Jared C. Troop, Hon. A. J. White, William A. D. Morse, John W. Anseley,

Robert L. Weatherbe, William F. McCoy, John D. McLeod, Murray Dodd, and Sandford H. Pelton, to be, during pleasure, Provincial officers under the names of our Counsel learned in the law, for the Province of Nova Scotia, hereby conferring on the said several persons and each of them full power and authority to execute and discharge the duties of the said office, and to have, hold, take and enjoy all rights, fees, privileges and advantages unto the said office belonging or in anywise appertaining;

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"And whereas we have also thought fit to regulate the precedence of the said several Counsel learned in the law, under the provisions of section second of chapter 21 of the Acts of 1874, entitled 'An Act to regulate the precedence of the Bar of Nova Scotia;' we do therefore hereby assign to the several persons above appointed precedence in the order following, that is to say:

"Charles B. Owen, S. H. Morse, Henry Pryor, Henry A. Grantham, William Howe, Hon. P. Carteret Hill, Alexander James, Peter H. Lenoir, James Thompson, James W. Johnston, William A. Johnston, M. H. Richey, Hon. Mather Byles Des Brisay, Hon. Daniel McDonald, J. N. Shannon Marshall, Robert G. Haliburton, Hon. Otto S. Weeks, J. C. Troop, Hon. H. A. N. Kaulbach, J. N. Ritchie, A. J. White, N. W. White, W. A. D. Morse, N. L. McKay, Hon. W. Miller, A. W. Savary, John W. Anseley, Robert L. Weatherbe, William F. McCoy, Samuel G. Rigby, John D. McLeod, Murray Dodd, and Sandford H. Pelton.

"And we do hereby declare, that as between each other, and as to all the members of the Bar, where precedence is not fixed by the said Act, the said several persons appointed our Counsel learned in the law shall be entitled to precedence in our said courts in the order in which their names are herein above recited. And we do



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hereby strictly enjoin all our said courts to grant precedence to our said Counsel learned in the law in the order above recited.

"In testimony whereof we have caused these our Letters to be made patent, and the Great Seal of our said Province of Nova Scotia to be hereunto affixed.

"Witness our trusty and well-beloved the Honourable Adams George Archibald, member of the Privy Council of Canada, Companion of the Most Distinguished Order of St. Michael and St. George, Lieutenant-Governor of Nova Scotia, at our Government House, in our city of Halifax, this twenty-seventh day of May, in the year of our Lord one thousand eight hundred and seventy-six, in the thirty-ninth year of our reign."

"By command,

(Signed) "P. CARTERET HILL,  
"Provincial Secretary."

On the 30th May, 1876, the respondent wrote the following letter to the Provincial Secretary :

"Halifax, 30th May, 1876.

"SIR,—I observe by this morning's paper that my name is included in a list of Queen's Counsel, published in the *Royal Gazette* of the 27th inst., to whom precedence has been given by His Honour the Lieutenant-Governor.

"As I have not asked for this privilege, I beg most respectfully to decline the honour intended to be conferred, and request that my name may be omitted from the Letters Patent.

"I have the honour to be, Sir,

"Your obedient servant,

(Signed) "J. N. RITCHIE.

"To the Honourable the Provincial Secretary."

He received the following answer :

"PROVINCIAL SECRETARY'S OFFICE,

"Halifax, N.S., May 30th, 1876.

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"SIR,—I have the honour to acknowledge the receipt of your letter of this day's date, requesting that your name may be omitted from the patent of precedence of Queen's Counsel, recently appointed.

"I have it in command to inform you, that as the Government did not appoint you a Queen's Counsel, they have no power to deprive you of the position.

"I have the honour to be, Sir,

"Your obedient servant,

(Signed) "P. CARTERET HILL.

"J. N. Ritchie, Esq."

Subsequently, the prothonotary of the Supreme Court of Nova Scotia at Halifax, in making up the dockets, etc., gave the appellants, with others, precedence over the respondent, which had not been accorded to them since the date of the respondent's appointment in 1872. Thereupon, on the 3rd of January, 1877, the respondent obtained from the Supreme Court of Nova Scotia the following rule *nisi* :—

"Supreme Court, Halifax, N.S.

"In the matter of the application of Joseph Norman Ritchie, for the recognition of his rank and precedence as Queen's Counsel.

"On hearing read the Letters Patent under the Great Seal of Canada, dated the 26th day of December, A.D. 1872, appointing the said Joseph Norman Ritchie one of Her Majesty's Counsel learned in the law, the affidavits of the said Joseph Norman Ritchie, sworn to on the 12th and 27th days of December, 1876, and the exhibits annexed thereto, and the documents or Letters Patent, dated on the 27th day of May, A.D. 1876, with

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reference to Queen's Counsel, and filed in this court on the 7th day of November last,—It is ordered that the rank and precedence granted to the said Joseph Norman Ritchie by said Letters Patent of 26th December, A.D. 1872, be confirmed, and that he have rank and precedence in this court over all Queen's Counsel appointed in and for the Province of Nova Scotia since the said 26th day of December, A.D. 1872, on the following grounds:

"1. Because the Letters Patent of 26th December, 1872, give rank and precedence to Mr. Ritchie, as a Queen's Counsel, from the date thereof, which have never been legally taken away.

"2. Because the document or Letters Patent of the 27th May, 1876, does not in any way affect said rank and precedence.

"3. Because said last-mentioned document is not Letters Patent issued by the Lieutenant-Governor of Nova Scotia under the Great Seal of that Province.

"4. Because no Patents of Precedence have been granted to any Queen's Counsel appointed after the 26th December, A.D. 1872, giving them rank and precedence over Mr. Ritchie.

"5. Because no Letters Patent, or Patents of Precedence, have been granted giving the Queen's Counsel appointed since 26th December, A.D. 1872, by Letters Patent under the Great Seal of Canada, precedence over Mr. Ritchie.

"6. Because chapter 24 of the Acts of the Legislature of Nova Scotia, for 1874, and all Letters Patent or other documents granted thereunder, are illegal and *ultra vires*, in so far as they may affect the rank and precedence of Mr. Ritchie, as granted to him by the Letters Patent of 26th December, 1872.

"7. Because last-mentioned chapter has not a retrospective effect.

"8. Because the Act of the Local Legislature of Nova Scotia, namely, chapter 20 of the Acts of 1874, under which certain barristers were appointed Queen's Counsel by the Lieutenant-Governor of Nova Scotia, by the document or Letters Patent of the 27th May, A.D. 1876, is *ultra vires*, and such appointments are therefore invalid and of no effect.

"9. Because the Acts authorizing the Lieutenant-Governor of Nova Scotia to appoint Queen's Counsel, and to give precedence to certain members of the Bar of Nova Scotia, were not passed until long after the grant of the Letters Patent conferring the rank and precedence on Mr. Ritchie, and cannot affect the rights thereby conferred.

"10. And for other grounds appearing from the said papers, affidavits and exhibits, unless cause to the contrary be shewn before the court on the third Saturday of February next ensuing.

"And it is further ordered that a copy of this rule be served upon each of the following Queen's Counsel and Barristers, viz.: C. B. Owen, Esquire; S. H. Morse, Esquire; Henry Pryor, Esquire; William Howe, Esquire; Henry A. Grantham, Esquire; The Honourable P. C. Hill; Peter H. Lenoir, Esquire; M. H. Richey, Esquire; The Honourable D. McDonald; J. N. S. Marshall, Esquire; Robert G. Haliburton, Esquire; Otto S. Weeks, Esquire; and The Honourable H. A. N. Kaulbach.

"Halifax, 3rd January, A.D. 1877.

"By the Court.

(Signed) "M. I. WILKINS,  
"Prothonotary."

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The Supreme Court of Nova Scotia, by a majority of judges, made the rule absolute on the second of the above grounds, maintaining the validity of the Acts

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mentioned, and also held that the seal affixed to the patent was not the true Great Seal of Nova Scotia.

The case was twice argued before the Supreme Court of Canada, in consequence of the resignation of two of the judges who heard the first argument.

As to the validity of the Great Seal, before the second argument before the Supreme Court, two Acts had been passed to settle this question (1), and therefore no further reference need be made to it.

A preliminary objection was raised on behalf of the respondent to the jurisdiction of the Court to entertain the appeal, on the ground that the *rule* absolute in this case was not a "judgment," from which an appeal will lie under the 17th sec. of the Supreme and Exchequer Court Act, but the Court decided to hear the appeal on the merits.

Mr. Haliburton, for the appellants:

[The argument as to the Great Seal of Nova Scotia is omitted.]

No question arises here as to whether the Crown had issued Letters Patent granting what did not belong to the Crown, or what was not within the exercise of its prerogative, precedence at the Bar being beyond question a matter of prerogative.

The only question here is whether the Crown, through its Keeper of the Great Seal, has not issued Letters Patent of Precedence which affect rights granted under previous Letters Patent. Mr. Ritchie claims that he has vested rights under his patent which cannot be superseded or affected.

The eighth ground relied on by him in his *factum* is the same as in his *rule nisi*, and is the only one that touches upon the validity of chapter 21 of Acts of 1874, or of the Patent of Precedence issued under it:

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(1) 40 Vict. c. 3, D., and 40 Vict. c. 2, N. S.

"Because cap. 21 of the Acts of the Legislature of Nova Scotia for 1874, and all Letters Patent or other documents granted thereunder, are illegal and *ultra vires*, in so far as they may affect the rank and precedence of Mr. Ritchie as granted to him by Letters Patent of the 26th December, 1872."

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The Crown, unless controlled by statute, can issue second Letters Patent which operate by way of extinguishment of previous Letters Patent.—17 Vin. (93 M. B. 5), 100, 109 (Q. B. 2), sec. 8. See argument of Attorney-General, also judgment of court *In re Bedard* (1).

To prevent error or surprise on part of the Crown, 6 Hen. VIII. c. 15, makes second Letters Patent void where they do not refer to previous Letters Patent. But where there are no fees or emoluments attached to subject of grant, such recital is not considered necessary: Vin. 109, Q. B.; *The King v. Foster* (2).

Though a subject may be injured by the issue of such subsequent Letters Patent, yet they must be recognised and respected by the court until duly cancelled by issue of *scire facias* by leave of the Crown, such Letters Patent being not void, but only voidable.

"When a patent is granted to the prejudice of a subject, the King of right is to permit him, upon his petition, to use his name for the repeal of it in *scire facias* at the King's suit, to hinder multiplicity of actions on the case."—2 Vent. 344. 17 Vin. 98, 100, 109, 115, 122 (u. b.), 155, sb. *Scire facias* may issue to revoke grants injurious to the rights and interests of third parties; though, if the patent be void in itself, *non concessit* may, it seems, be pleaded without a *scire facias*.—Chitty on Prerog. ch. 12, s. 3 (cites 3 Com. 260, 2 Rol. Ab. 191, S. pl. 2). Sir George Mackenzie says that by the law of Scotland, which on this point we find the

(1) 7 Moore, P. C. C. 23.

(2) 2 Freeman 70.

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same as that of England, the validity of second Letters Patent must be raised, not by pleading, but by an application to have them cancelled. "No right once passed under the Great Seal can be annulled by way of exception, but only by way of reduction. When double rights are passed, the first is put to the necessity of a reduction" (1).

We contend that 37 Vict. c. 21 and Letters Patent issued thereunder are not, as contended for by respondent, "illegal and *ultra vires* in so far as they may affect the rank and precedence of Mr. Ritchie, granted to him by the Letters Patent of the 26th December, 1872."

As respects the precedence of Queen's Counsel appointed since 1867, sec. 2 of 37 Vict. c. 21, is merely declaratory, and did not alter or abridge the previous right of the Lieut.-Governor to issue the Letters Patent of precedence in question.—*See James, N. S. R. 182.*

As that Act refers to matters exclusively reserved for the Local Legislatures, it is not *ultra vires* so far as the rights of the Dominion Parliament are concerned.

It cannot be contended that the Act is *ultra vires* because it may lead to the passing of Letters Patent which may affect the priority of persons claiming precedence under Letters Patent issued since 1867 under a Greater Seal by the Governor-General. The Patent of 1854, issued by the Lieutenant-Governor to Mr. Uniacke, gave him precedence over Queen's Counsel holding patents directly from the Queen. The commission and instructions of the Governor-General are unchanged, so far as any right to issue Letters Patent of Queen's Counsel is concerned.

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(1) See Obs. on the VI. Parliament of James V., Sir George Mackenzie's Works, 1278. Also, 4 Inst. 87, 88, Bro. Ab. Tit. *Scire Facias*, 69, 185. Dyer, 197b, 198b. Cases cited in 2 T. R. 564. Bro. Ab. Tit. Patents, pl. 2, *R. v. Chester et al.* 5 Mod. 301. *Rex v. Kemp*, 4 Mod. 277. *The King v. Foster*, 2 Freeman, 70.

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A Provincial Act within the limits of local legislation, may, if assented to, limit the Royal prerogative as fully as if it were an Act of Parliament, or a Dominion Act within the scope of Dominion Legislation. The effect of the assent given to the Prince Edward Island Land Act is in point—it being held by the Crown that it was bound by the assent given to that Act, and that the prerogative was thereby limited.

The Crown does not regard this Act as infringing upon its prerogative, as it was passed at the suggestion of the Imperial Government.

“When an Act of Parliament doth authorize the Lord Chancellor or Lord Keeper to make or grant any commission under the Great Seal, he may make or grant the same without any further warrant, because the King is a party to the Act of Parliament, and there cannot be a greater warrant to the said Chancellor than an Act of Parliament.”—4 Inst., ch. 29, p. 169.

From 1863 the use of the Royal Warrant was dispensed with by a despatch from the Secretary of State for the Colonies in the case of all appointments except in the Admiralty Court.

The intent of the Act and of the Letters Patent of precedence is clear and explicit.

No reasonable doubt can exist that the Legislature by this Act proposed to regulate the precedence of all Queen's Counsel not appointed prior to July, 1867, as it was entitled “An Act to regulate the precedence of the Bar of Nova Scotia,” and was passed with the sole object of enabling the Lieutenant-Governor to assign to the Queen's Counsel whom he might appoint such relative rank as he might think fit, as respects the Queen's Counsel that had then been appointed since July 1st, 1867.

Section 2 of the Act provides that members of the Bar appointed Queen's Counsel since July 1st, 1867, and



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members of the Bar to whom, from time to time, Patents of Precedence may be granted, "shall severally have such precedence as may be assigned to them by Letters Patent, which may be issued by the Lieut.-Governor under the Great Seal."

The Act being therefore clear, the intent of the Letters Patent of Precedence, which profess to carry out the provisions of the Act, is equally clear. After appointing seventeen members of the Bar Queen's Counsel, the Letters Patent, reciting sec. 2 of the Act, proceed: "We do hereby assign to the several persons above appointed, precedence in the following order, that is to say"—It then gives, according to the dates of their being called to the Bar, the names of thirty-four Queen's Counsel, including the seventeen first appointed, and all not appointed prior to July, 1867. By this list, the appellants, who were then appointed Queen's Counsel, have rank given to them before Mr. Ritchie, who had been appointed in 1872.

The court is asked by respondent to adopt one of two interpretations.

1st (in direct contradiction to the very words of the Letters Patent), that they only regulated the precedence of the Queen's Counsel then appointed "as between each other," and not "as to all members of the Bar whose precedence is not fixed by the said Act" (*i.e.*, all not appointed prior to July, 1867).

2nd, a nugatory and absurd intent—that though the Patent of Precedence proposed to give some of the Queen's Counsel then appointed precedence before Mr. Ritchie, it did not affect his precedence as respects them.

It is impossible to see how the court, unless it is able to cancel or ignore the Letters Patent, can assume that a list of precedence which includes Mr. Ritchie by name was not intended to affect his precedence.

Even if he had not been mentioned, his precedence would have been affected by implication. The commission of a Justice of the Peace may be superseded "by a new commission, which virtually but silently discharges all the former justices not named therein, for two commissions cannot exist at once."—1 Comm. 353.

As the Act in question provides that members of the Bar from time to time appointed after the first day of July, A.D. 1867, to be Her Majesty's Counsel for the Province, etc., shall severally have such precedence in such courts as may be assigned to them by Letters Patent which may be issued by the Lieutenant-Governor under the Great Seal, he can claim no precedence not assigned to him by such Letters Patent.

There are no vested rights in Patents of Queen's Counsel, or Patents of Precedence, but the Crown, as "the fountain of justice and of honours," can at all times, at its will, regulate precedence at the Bar. The Attorney-General, in *In re Bedard* (1), contended that "the Crown can by Letters Patent give precedence at pleasure, *except so far as this prerogative is controlled by the statutes* : 31 Henry VIII., c. 10 ; and 1 W. & M. s. 1, c. 21. All degrees of nobility and honour are derived from the King as their fountain, and he may institute what new title he pleases. It is a part of the prerogative at common law. No one can doubt that the Queen has the right to give precedence among Queen's Counsel." The court decided in that case that Letters Patent of Precedence to a Judge affecting precedence under previous Letters Patent were valid. "A custom has for some time prevailed of granting Letters Patent of Precedence to such barristers as the Crown thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents,

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(1) 7 Moore P. C. C. 23.

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sometimes next after the Attorney-General, but usually next after Her Majesty's Counsel then being."—3 Comm. 28.—See also James, N. S. R. 182. 4 Inst. 167, 362. 1 Comm. 272. Chitty on Prerog. 77, 82, 107, 112, 132, 330 note *g*, also 331. Manning's Case of the Serjeants, 127. Droit Public de Domat, Liv. i. tit. ii. sec. 2, p. 10 (Fol. Ed. 1745).

In *ex parte Robertson* (1), the court refused to enquire into the issue of Letters Patent by a Governor and Council superseding previous Letters Patent, the office in question being held at will.

Respondent's application is irregular and unprecedented.

Even assuming that no Act had been passed, authorizing the Lieutenant-Governor to issue Letters Patent of Precedence, or, if passed, that it was *ultra vires*, and that the Keeper of the Great Seal improperly and without any warrant affixed the signature of Royalty to Letters Patent of Precedence, yet these are matters between the Crown and its Keeper of the Great Seal, into which the court cannot enquire, but it must recognise the Letters as valid and binding upon the Court until an Act of Parliament has been passed to annul the Patent, or the Crown itself issues a *scire facias* to cancel it. "The Great Seal shall always be credited, and where the certificates under it are not strictly true, there is no remedy but an Act of Parliament, or by authority of the Chancellor of England to cause parties to bring them into Chancery" (2).

That the Crown to this day jealously preserves its prerogative of enquiring into the validity of its grants, is clear from the fact that in the recent Supreme Court of Judicature Act, whereby it was proposed to transfer to

(1) 11 Moore P. C. C. 288.

(2) 17 Vin. 71-78. Nel. Ab. III., 207, 210.

the new Court of Appeal the jurisdiction of the Court of Chancery, as well as of the House of Lords, and of the Judicial Committee of the Privy Council, one of the few things reserved was "any jurisdiction vested in the Lord Chancellor in relation to grants of Letters Patent, or the issue of Commissions or other writings to be passed under the Great Seal of the United Kingdom."—36 and 37 Vict. c. 66, s. 17. "By this section it will be seen that the most important branch of the existing common law jurisdiction of the Lord Chancellor, viz., holding plea by *scire facias* to repeal a patent, is not given to the High Court. It is supposed that this will be retained as a personal jurisdiction of the Lord Chancellor, as it is not given to the High Court, and, of course, not to the Court of Appeal."—*See* Griffith, Sup. Court of Judic. Act, p. 17.

The prerogative of the Crown of directing *scire facias* to issue to repeal its grants is not vested in the Supreme Court of Nova Scotia. *See* Rev. Stat. (4th series), c. 106, s. 1; c. 95, ss. 1 and 7; c. 11, s. 18. *Roy n'est lie par aucun Statute, si il ne soit expressement nomee. See* Chit. on Prerog. 366, 374, 383; Broom Leg. Max. 74, 75.

The Supreme Court of Nova Scotia was asked to pronounce these Letters Patent to be void, in proceedings to which the Crown was not made a party, though there is not a single authority or precedent to be found for such a course, nor has any been cited in support of Mr. Ritchie's application.

Mr. Ritchie's application is highly irregular and unprecedented, inasmuch as, instead of praying the Crown to sue out a *scire facias* to cancel its Patent, he takes proceedings to which the Crown is not made a party, and without citing a single precedent or authority in support of his application, he asks the Supreme Court of Nova Scotia in a summary way to cancel or ignore Letters Patent that have been granted under the Great Seal.

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It is therefore contended that, as the Great Seal is the official signature of Royalty, these Letters Patent are a Royal grant as fully as if issued by the Lord Chancellor, or by the Queen herself; that they do not come within the class of Royal grants which a series of statutes have rendered void, and which the courts of law can therefore treat as *void*; that, if *voidable*, it can only be by *scire facias* issued in the name and by leave of the Crown; that this remedy was open to Mr. Ritchie when he took these proceedings, and is still open to him should he consider himself injured by these Letters Patent.

In all matters that are under the exclusive jurisdiction of the Local Legislature, the Lieutenant-Governor represents the Queen, and all powers enjoyed by him prior to Confederation in relation to the organization of the courts and the administration of justice were confirmed by the B. N. A. Act.

The Act regulating precedence having been passed at the suggestion of the Crown, thereby received the previous assent of the Crown, and also subsequently received the assent of its representative, the Lieutenant-Governor.

In *The Queen v. Burah* (1), it was held, where the prerogative of pardon had been exercised by the official governing a newly created district in India, that "where plenary powers of legislation exist as to particular subjects, whether in an Imperial or Provincial Legislature, they may, in their Lordships' opinion, be well exercised either absolutely or conditionally."

The B. N. A. Act gives the Provincial Legislature, as respects a large number of important subjects, "*exclusive powers* of legislation." If in these matters plenary powers are not possessed by it, where do they exist?

Mr. Ritchie has not questioned the validity of the Act, except so far as it affects his precedence. Any decision

of the court which goes beyond this, and decides that the Lieutenant-Governor is not the Queen's representative, and that the Queen is no part of Provincial Legislatures, is a serious one, that vitally concerns the whole Dominion. This is a constitutional question which was not argued before.

Supposing the Patent void, or rather voidable, we are dealing with the Lieutenant-Governor here as Keeper of the Great Seal, an office which does not necessarily require the person holding it to be the Queen's representative. The Keeper of the Great Seal in England is not the Queen's representative. If he has improperly used the Great Seal, there are recognised modes of cancelling the Patent.

It cannot be said that the Queen has not authorized the issue of this patent, for it is *signed by the Sovereign*. The B. N. A. Act, assented to by the Crown, continued to the Provinces the use of their Great Seals, and the Great Seal is recognised everywhere as "*the most solemn signature of the Sovereign*." Whether the Crown was wise in allowing its signature to be used by the Lieutenant-Governor is not a question for this court. It has authorized the use, and the signature must be recognised and respected until the Patent is properly cancelled by *scire facias*, or an Act of Parliament.

Whether the title of Queen's Counsel is a legal rank or a title of honour does not arise here, as the Patent of Queen's Counsel issued in 1876, under c. 20 of Acts of 1874, did not affect Mr. Ritchie's rank under his Patent of 1872. The Patent of Precedence, however, issued under c. 21, did affect him, and the only question for our consideration is as respects its validity. It confers no rank or status outside the courts, and is merely a mode of regulating the business of the courts by specifying the order in which counsel will be heard.

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I find the responsibility unexpectedly thrown upon me of defending the status hitherto claimed and enjoyed by Lieutenant-Governors and Provincial Legislatures, and I therefore do not profess to do so, as the subject was not discussed in the argument before the Supreme Court of Nova Scotia. It was quite unexpected by me, and apparently also by respondent, who, in his factum, has given no authority or reference on this point, except the Governor-General's Commission, which, as respects these questions, is the same as before the Union. The subject is of such grave public importance that it is to be hoped it will not be necessary, under the circumstances, for the court to consider it.

Mr. Cockburn, Q.C., for the respondent :

I contend that the statute of the Province of Nova Scotia, 37 Vict. c. 20, respecting the appointment of Queen's Counsel, and so much of the statute 37 Vict. c. 21, as affects the right of precedence and of preaudience of Queen's Counsel, are *ultra vires*, and that the Letters Patent of 27th May, 1876, issued under the authority of the latter statute, are wholly inoperative.

The appointment of Queen's Counsel is a prerogative of the Crown, and no such power is conferred on the Lieutenant-Governors of Provinces, nor could the Provincial Legislatures under the Constitution (*see* B. N. A. Act, sec. 92) legislate on any subject of prerogative law. By the Royal Commission granted to the Governor-General under the Great Seal of the United Kingdom, certain limited powers to represent the Crown in its prerogative rights are conferred (paragraph 8 clearly embraces the appointment of Queen's Counsel). But the royal instructions which accompany the commission guardedly require that all Bills passed by the Parliament of Canada which touch the prerogative shall be reserved for Her Majesty's

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pleasure. And while the Provincial Legislatures may enact laws for the amendment of their own Constitutions, they are prohibited from altering the office of the Lieutenant-Governor (B. N. A. Act, sec. 92. sub-sec. 1); so that unless this officer has power conferred upon him by the Constitutional Act to represent Her Majesty in the exercise of her prerogative powers, he can neither do so now, nor can he at any future time be empowered to do so by the Legislatures of the Provinces. The office of the Lieutenant-Governor is defined in secs. 58 and 59. He is the representative of the Governor-General, not of the Queen; he assents to Bills in the name of the Governor-General, not of the Queen; and in the exercise of his powers withholds Bills for the Governor-General's, and not for the Queen's assent. All the laws of the Parliament of Canada are made by the Queen, the Senate, and the House of Commons. The Queen is present, and is a constituent part of Parliament. She does not merely assent to Bills, she is also an enacting party; not so with the Provincial Legislatures. Those bodies exclusively make the laws within the limit of their authority. While the most jealous care is taken in the B. N. A. Act to provide for the speedy transmission of authentic copies of all Bills passed by the Parliament of Canada for Her Majesty's pleasure, no similar provision exists as to the Provincial Legislatures. The Queen may be wholly unadvised and uninformed as to the laws they are enacting, and there exists no necessity for supervision, inasmuch as Imperial and Prerogative questions do not fall within the scope of their powers.

There have been three important occasions on which the powers of the Lieutenant-Governors, in respect of their being representatives of the Crown, have been brought up for consideration since the Confederation.

The first was the claim of the Lieutenant-Governor of



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New Brunswick to exercise the pardoning power. (See the report of the Minister of Justice, 21st of December, 1868, and the despatch of Lord Granville to the Governor-General of 24th of February, 1869.)

The second was the question as to the amnesty claimed to have been promised by the Lieutenant-Governor of Manitoba in the Lepine case. (See the despatch of Lord Carnarvon of 7th of January, 1875.)

On both of these occasions the pretension was clearly refuted and refused.

The third occasion arose (indirectly) on the question of the Ministerial responsibility of the Governor-General's advisers for his disallowance of Bills passed by the Local Legislatures within the scope of their powers. (See the report of the Minister of Justice, 22nd December, 1875, in which he says: "The powers of Provincial Legislatures are, by their constitution, limited to certain subjects of a domestic character, so that their legislation can affect only Provincial, and at most Canadian interests. Provincial Acts, to the extent to which they may transcend the competence of the Legislature, are inoperative *ab initio*; there is no power to allow them, nor can any attempt at allowance give them vitality, so that void Acts left to their operation are void altogether.") . . . The contention of this State paper was that the Dominion Government alone should supervise and control the Provincial legislation.

The theory that the Queen is bound by certain statutes because she is an assenting party, has no application to the Provincial statutes. These must stand or fall on a strict interpretation of the powers of the Local Legislatures. The two Acts in question are clearly *ultra vires* for the reasons given, and the Letters Patent appointing Mr. Lenoir and others to be Queen's Counsel must therefore fall to the ground.

In any case those statutes could not have had a retrospective effect so as to annul the right of pre-audience already granted to Mr. Ritchie under the Great Seal of the Dominion.

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On the constitutional question, the learned counsel referred to Sessional Papers, 1867 and 1868, Vol. I., No. 22; Sessional Papers, 1869, Vol. II., No. 16; Sessional Papers, 1875, Vol. VIII., No. 11; Sessional Papers, 1876, Vol. IX., No. 116; return to an address for correspondence relating to the appointment of Queen's Counsel, Session of 1873, No. 50; B. N. A. Act, secs. 9, 17, 91, 92 (sub-sec. 1), 56, 58, 59; Mr. Todd's Pamphlet on a Constitutional Governor, p. 29; Chitty on Prerogatives, pp. 107, 331; Bac: Abr: Title Prerogative.

I further submit that the writ of *scire facias* is not, as contended for, the only proceeding to avoid Letters Patent; their validity may be questioned in actions at law: *Perry v. Skinner* (1); *Williams' Saunders* (2); *Foster on Scire Facias* (3). As to the Crown being bound generally by Acts of Parliament, see *Mayor, etc., of Weymouth v. Nugent* (4); also that statutes should be construed so as not to operate retrospectively against vested rights: *Perry v. Skinner* (1), (cited above); *Thistleton v. Frewer* (5); *Maxwell on Statutes* (6); *Dwarris on Statutes (passim)*. Finally, that powers conferred by the Legislature, such as the power to regulate the Bar, should be exercised, not arbitrarily as was done here, but with sound and judicial discretion: *Lee v. Buda and Torrington Ry. Co.* (7); *Marshall v. Pittman* (8); *Maxwell on Statutes* (9).

(1) 2 M. & W. 475.

(2) Vol. II., p. 252.

(3) p. 256, notes.

(4) 11 Jur. N. S. 465; 6 B. & S. 22.

(5) 31 L. J. Ex. 231.

(6) p. 21 *et seq.*

(7) L. R. 6 C. P. 581.

(8) 9 Bing. 595.

(9) p. 21.

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STRONG, J.:—

Was of opinion that the Nova Scotia statute did not affect the precedence of Queen's Counsel appointed by the Crown, and that consequently the Court was not called upon to pronounce upon the constitutional power of the Legislature to pass that statute. He was therefore of opinion that the appeal should be dismissed with costs.

[*Translated.*]

FOURNIER, J.:—

[The learned judge having stated at length why, in his opinion, the court had no jurisdiction, and ought not to entertain the appeal, proceeded as follows (p. 605).]

For these reasons I should be inclined to decide that this court has no jurisdiction, and ought not to give any judgment. But, as I am under the impression that I am alone in holding this opinion, I shall shortly state the reasons of my decision on the merits of the question at issue.

After Confederation, difficulties arose in the Provinces of Ontario and Nova Scotia as to the power of the Lieutenant-Governors to appoint Queen's Counsel. As this question affected the Royal prerogative, it was referred by the Privy Council of Canada to the Colonial Secretary, in order to obtain the opinion of the law officers of the Crown. The memorandum of the Privy Council, signed by Sir John Macdonald, after citing sec. 92, sub-sec. 14 of the B. N. A. Act, relative to the organization of courts, contains the following declaration:

"Under this power, the undersigned is of opinion that the Legislature of a Province, being charged with the administration of justice and the organization of the courts, may, by statute, provide for the general conduct of business before those courts; and may make such provision with respect to the Bar, the management of criminal

prosecutions by counsel, the selection of those counsel, and the right of pre-audience, as it sees fit. Such enactment must, however, in the opinion of the undersigned, be subject to the exercise of the Royal prerogative, which is paramount, and in no way diminished by the Act of Confederation."

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To this part of the memorandum the Colonial Secretary, Lord Kimberley, made the following reply, in his despatch of February 1st, 1872:

"I am further advised that the Legislature of a Province can confer by statute on its Lieutenant-Governor the power of appointing Queen's Counsel; and with respect to precedence or pre-audience in the courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor-General and the Lieutenant-Governor, as above explained."

The Chief Justice, Sir William Young, in the reasons for his judgment in this case, speaking of the effect of this correspondence upon the two Acts in question, expresses himself as follows: "Among the grounds taken in the rule it is urged that the 20th and 21st chapters of the Provincial Acts of 1874 are *ultra vires*, and the appointments under them invalid and of no effect. But the Crown, through its Secretary of State, having authorized such enactments, and the Acts having gone into operation, this contention is quite untenable."

As the decision of this case does not require it, I shall not examine the question whether the reply of Lord Kimberley, making known the opinion of the law officers, is to be taken to involve a sufficient consent on the part of Her Majesty to authorize the legislation which followed thereon. Suffice it to say, that I recognise the wisdom of the rule which presumes in favour of the legality of legislative Acts, and which leads the courts to examine the

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question of their validity, only in those cases where the decision of the question submitted to the court imperatively demands it. The present is not one of these cases, and the rule to which I have just referred ought to be applied. The question to be decided here is, not whether the Acts in question are *ultra vires*, but rather whether one of them, cap. 21, can have a retrospective effect, so as to affect the Letters Patent of December 26th, 1872, granted to the Respondent. It is therefore useless to consider whether these two Acts are constitutional, nor could it be done in the present case without a violation of the rule above-mentioned. For this reason I give no opinion on the validity of the Acts in question, confining myself to the question raised as to the retrospective effect of cap. 21. The second section of this Act is as follows: "Members of the Bar from time to time appointed after the 1st day of July, 1867, to be Her Majesty's Counsel for the Province, and members of the Bar to whom, from time to time, Patents of Precedence are granted, shall severally have such precedence in such courts as may be assigned to them by Letters Patent, which may be issued by the Lieutenant-Governor under the Great Seal of the Province."

The Appellants contend that the terms of this section give an absolute power to the Provincial Government to assign to the Queen's Counsel whom it may appoint by virtue of that Act, rank and precedence over those previously appointed by Her Majesty or her representative. This interpretation is certainly erroneous. The section is designedly worded so as to give it a prospective effect only. It does not contain a single one of the expressions ordinarily employed to give a retrospective effect. To admit that this Act is retrospective would be a violation of the following general rule of interpretation: "It is a general rule that all statutes are to be considered

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to operate in future, unless from the language a retrospective effect be clearly intended." It would be useless to cite here authorities for this principle. Suffice it to say, that I rely on the numerous authorities cited in the case of *The Queen v. Taylor*, (1) decided by this court, upon the retrospective effect sought to be given to one section of the Act by which this court was constituted.

Relying on these authorities, I am of opinion that the section of cap. 21 above cited has no retrospective effect; that the Letters Patent giving rank and precedence to the Appellants ought not to have any greater effect than the Act itself, nor to affect in any manner the position of the Respondent.

I am therefore of opinion that the appeal ought to be dismissed with costs.

HENRY, J.:—

This is an appeal from a decision of the Supreme Court of Nova Scotia, on an application sustained by affidavits of the Respondent, asserting a right of precedence as Queen's Counsel over the Appellant, he, the Respondent, having been appointed by the Governor-General in Council, previous to the appointment as Queen's Counsel of the Appellant by the Lieutenant-Governor of Nova Scotia in Council, under an Act of the Legislature of Nova Scotia, passed subsequent to the appointment of the Respondent, and by which precedence over the Respondent was given to the Appellant. The court of Nova Scotia, while upholding the constitutionality of the Act, held that, while the right to regulate the matter of precedence generally appertained to the Local Legislature, it had not by the Act exercised the power to the extent of giving precedence to counsel appointed under it over those previously appointed by

(1) 1 Can. S. C. R. 65.

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the Governor-General in Council, and that it consequently had no retrospective operation. I feel bound to dissent from that proposition.

The second section of chapter 21 provides that:

"Members of the Bar from time to time appointed after the first day of July, in the year of our Lord 1867, to be Her Majesty's Counsel for the Province, and members of the Bar, to whom from time to time Patents of Precedence are granted, shall severally have such precedence in such courts as may be assigned to them by Letters Patent, which may be issued by the Lieutenant-Governor under the Great Seal of the Province."

The retrospective operation is not only seen, but the limit of it is to be back to a certain date. How then can I conclude the Legislature did not mean what it so plainly says? This section in plain words is retrospective. It provides that all Queen's Counsel appointed *after the first day of July, 1867*, with those subsequently appointed, shall have the precedence awarded them by the Letters Patent to be subsequently issued. Both classes are by the provision put upon the same footing, and an individual is to have precedence irrespective of any position he formerly held. If, indeed, the words were merely that Queen's Counsel thereafter should have the precedence awarded by the patents, for the issuing of which it provided, a question might then be fairly raised that it was not intended to be applied to previous appointments; but here the provision by unmistakable language includes all appointed since the date specially limited, and applies as forcibly to the Respondent as to the Appellant. The words "from time to time" in the section do not only authorize the interference with the patents issued since the date mentioned, but would, in my judgment, authorize the change "from time to time" of the precedence given by any patent previously issued

under the same section. Having arrived at these conclusions, it becomes necessary to ascertain whether the Local Legislature had the power to pass an Act with such a provision.

In the argument before us it was contended, as it had been previously, that the Act of the Local Legislature was *ultra vires*; and that the patent of the Appellant was not verified by the affixing thereto of the seal contemplated by the Act, and was therefore void. In the view I take of the first objection, it is unnecessary to refer to the second; and as, through the means of subsequent legislation, any doubts upon that question have been removed, I shall, passing it by, devote my consideration to the one first mentioned.

The Act in question was passed in 1874, and to decide the point raised it is necessary to ascertain the extent of the functions of the Provincial Legislatures, and their right, if any, to deal with the matter of the appointment of Queen's Counsel, and to confer on the Lieutenant-Governor in Council the power of awarding precedence to counsel in the Provincial Courts. No special reference is made to the subject in the B. N. A. Act, or in the powers given by it to the Local Legislatures; and, unless included in and covered by the general provisions of sub-section 14 of section 92 for "the administration of justice in the Province," and "the constitution, maintenance and organization of Provincial Courts," it is difficult to discover whence the Local Legislatures derive any power over it.

The Local Legislatures are now simply the creatures of a statute, and under it alone have they any legislative powers. The Imperial Parliament, by the Union Act, prescribed and limited their jurisdiction; and, in doing so, has impliedly but virtually and effectually prohibited them from legislating on any other than the subjects

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comprised in the powers given by that Act. The right of the Imperial Parliament, when conferring legislative powers on the Local Legislatures, to limit the exercise of them, cannot be questioned; and any local Act passed beyond the prescribed limit, being contrary to the terms of the Imperial Act, must necessarily be *ultra vires*.

That the right of granting Letters Patent of Precedence to barristers is personal to the Sovereign, is a proposition that has never been questioned, and there is no record of any parliamentary attempt to interfere with its exercise. Chitty, in his work on Prerogatives (at page 116), says:—

“If a Peer be disturbed in his dignity, the regular course, says Lord Holt, is to petition the King, and the King indorses it and sends it into the Chancery or the House of Peers, for the Lords have no power to judge of peerage unless it be given to them by the King.”

At page 118:

“To the Crown belongs also the prerogative of raising practitioners in the Courts of Justice to a superior eminence by constituting them Serjeants, etc., or *by granting* Letters Patent of precedence to such barristers as His Majesty thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents.”

At page 107:

“The Crown alone therefore can create and confer dignities and honours. The King is not only the fountain; but the parent of them. Nor can even an ordinance of the House of Lords confer peerage.”

The Sovereign in England manifests his will by the issue of patents, but I can see no objection to the delegation, without any legislation, of the power to any immediate representative of the Crown to issue such patents

within his territorial jurisdiction. The Imperial Parliament, by an Act assented to by the Sovereign, could, no doubt, otherwise provide for conferring dignities and for giving precedence to barristers in the courts, and could specially authorize colonial legislation for that purpose ; but, without that authority, I cannot discover, in the present constitution of the Local Legislatures, any power to deal with the subject.

A despatch of Lord Kimberley, Colonial Secretary, in 1872, addressed to the Governor-General of Canada, has been referred to as giving sufficient authority to Local Legislatures ; but I feel bound to except to the affirmative ruling on that point in one, at least, of the judgments of the court in Nova Scotia. His lordship in that despatch, after negating the power of a Lieutenant-Governor since the union to appoint Queen's Counsel, says :

"I am further advised that the Legislature of a Province can confer by statute on its Lieutenant-Governor the power of such appointment, and, with respect to precedence and pre-audience in the courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor-General and the Lieutenant-Governor, as above explained."

This despatch makes no reference to the source of the power thus attributed to the Local Legislatures, or of the advice upon which such is alleged ; and I am, therefore, unable to consider the grounds upon which the position is taken, and for which otherwise I have been unable to find any authority. Unless within the scope of the Imperial Act we find evidence of the power in question, from what other source could it be derived ? It is contended that, without any legislative power to deal with this subject, the Act of the Local Legislature

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is not *ultra vires*, because, first, it is in the terms of that despatch ; and, secondly, it has been assented to by the Governor-General, representing the Sovereign. The Sovereign could, no doubt, under her Royal sign manual, give the necessary power to a Governor, but the mere despatch of a Colonial Secretary cannot be held sufficient to transfer to any body the exercise of a purely prerogative right of the Sovereign, when merely suggesting the usurpation of that right by a subordinate, or, indeed, any Colonial Legislature. If, as I have already shewn, the local legislative power is limited by the Imperial Parliamentary authority which created it, a statutory prohibition is thereby interposed to legislate beyond the prescribed subjects, and that prohibition is operative to make void any Act embraced within any subject-matter of such prohibition. This doctrine is applicable independently of any question of conflict in legislation between the Dominion Parliament and the Local Legislatures. The power of the Imperial Parliament in the matter of the creation and distribution of the colonial legislative powers is supreme, and no Colonial Secretary has *ex officio* the right, by a despatch or otherwise, either to add to, alter, or restrain any of the legislative powers conferred by the Imperial Act in question, or, indeed, by any Act, or to authorize a subordinate Legislature to do so.

The special assent of the Queen to the local Act providing for the issuing of patents of legal precedence, could not, in my opinion, validate it. The Local Legislatures have, as I have already stated, a prescribed and limited jurisdiction, and, if the subject in question is beyond their legislative limit, the mere sanction of the Queen could not validate the Act passed in reference to it.

But, as the Sovereign is the source of all honours and dignities, it is argued that the Royal assent to the Act,

however otherwise *ultra vires*, must be taken as a legislative declaration of the waiver and transference of the Sovereign's functions. Several difficulties, however, present themselves. The first is, that by such a conclusion the Act of the Imperial Parliament would be extended, if not in part repealed. Second, if the local Act be *ab initio* void, it cannot become law merely by the assent of the Sovereign. It might as well be claimed that an ordinance of a City or County Council of the same tenor, giving power to a Mayor or Reeve to appoint Queen's Counsel, if assented to by the Queen, would be valid. If the Imperial Statute has not given the necessary legislative power to the Local Legislatures, an Act of theirs would be of no higher value than a city ordinance such as I have stated. The argument of this question, however, is unavailable, for the Queen has not signified her assent to the Local Act in question. By the provisions of section 90 of the Imperial Act, the Governor-General, and not the Queen, assents to local Acts made in his name, as provided. The Lieutenant-Governors are appointed, not by the Queen, but by the Governor-General in Council. It cannot, therefore, be successfully contended that the Queen has assented to the local Act in question; nor can it be with greater success contended that by assenting to it the Governor-General had any power in doing so to interfere with the Royal prerogative in question. It is not necessary to say what means directly used by the Sovereign would be operative to authorize the issuing of patents for the appointments in question. Some may be found, but it is only necessary at present to deal with the course which has been already taken.

Looking, then, at sub-section 14 of section 92, let us ascertain the ground it covers:

"The administration of justice in the Province, includ-

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ing the constitution, maintenance and organization of Provincial courts, and including procedure in civil matters in those courts."

The matter of the administration of justice, the constitution, maintenance and organization of courts and procedure therein, has for centuries challenged and obtained Parliamentary consideration in England, and statutes have been frequently passed to regulate them; but in none of them is found provision for the appointment of Queen's Counsel. The prerogative of the Sovereign has been universally and at all times admitted and exercised. Such being the case, how can we say that it was intended by the section in question that the Imperial statute should give to the Local Legislatures a power to regulate the appointment of Queen's Counsel, when Parliament itself, recognising at all times the Royal prerogative, exercised no such power? The legislative powers given by sub-section 14 are full and complete as far as they extend, and may be fully executed without including the right to provide for the appointment of Queen's Counsel.

Provisions for such appointments are not necessarily included in those for the administration of justice, or for the constitution, maintenance or organization of courts; and as, at the time of the passing of the Imperial Act, the Royal prerogative in regard to them had never been questioned in England, we are bound to conclude, in the absence of express legislation, that its Parliament did not intend to interfere with its exercise, and did not intend to give to subordinate Legislatures a power to deal with a subject which it had never itself exercised or contended for.

Independently of that construction, we have to be governed by the well-settled doctrine that the Crown is not affected by legislation unless specially referred to,

and consequently that its fully admitted prerogative of regulating precedence at the Bar can only be affected or taken away by constitutional legislation in clear and express terms.

I entirely agree with a remark contained in one of the judgments of the court in Nova Scotia, that it would be ridiculous and an absurdity "that a scale of precedence should be adopted by the Lieutenant-Governor to-day, to be overruled by another framed in Ottawa to-morrow, and that reversed the next day by a fresh gubernatorial act in Nova Scotia."

But I cannot concur in the conclusion drawn, that "therefore the Act confers on the Lieutenant-Governor the exclusive right of regulating the precedence of Counsel in this Province,"—for the best of all reasons, that, in my opinion, the local statute is *ultra vires*—gives no power to the Lieutenant-Governor to issue patents for such appointments—and therefore no such ridiculous or absurd condition of matters can arise or exist. The anomaly and absurdity would appear only by the improper assumption of the right by which they would be created, and the suggestion of them is rather an argument against the right claimed for the Local Legislature.

The preamble to the local Act in question is as peculiar as illogical. It recites that

"Whereas the regulation of the Bar in Nova Scotia is vested in the Provincial Legislature; it is expedient, for the orderly conduct of business before the Provincial Courts, that provision be made for the order of precedence of the members of such Bar in such courts."

It rests the right to legislate in respect to precedence upon the properly alleged right to legislate in respect to the Bar generally, but the latter right, being limited short of the matter of precedence, cannot in its exercise

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affect that subject. It might have been considered *expedient* to deal with the matter of the appointment of Queen's Counsel, but that consideration has little value in determining the matter of legislative jurisdiction.

In England, the Sovereign, as a general rule, uses the prerogative to confer honours and dignities upon eminent and deserving harristers, noted for the exhibition of superior legal talents and abilities and public services. The object of the local Act in question, as the preamble exhibits, is not only very different, but novel.

On behalf of the Appellant, an objection was taken which demands notice. It is that the only mode of attacking the patent issued to him was by *scire facias*. Had the proceeding been to vacate or repeal a patent of the Crown, valid until set aside, the objection would have been good, but it does not require any such proceeding in a case where the fact of a valid patent having been issued is negatived, as it is in this case, by an adjudication that the patent was *ab initio* void. It does not require a procedure by *scire facias* to avoid the consequences of an unauthorized patent. A *scire facias* admits the validity of a patent. A court is asked, for reasons shewn, to vacate or repeal it, in the same way as an action for divorce must be shown to be based upon a legal marriage. And, in an action for infringing a patent, a plea denying that it was issued would put in issue the validity of it.

The position of the Respondent, as given by the patent under the Great Seal of Canada, when issued, was not only unassailed, but admitted at the arguments, and as to it I am not, therefore, called upon to express an opinion; and as, in my opinion, the subsequent local Act is *ultra vires*, I can come to no other conclusion than one in favour of the precedence acquired by the Respondent under his patent. His application to the court below

was for the judgment of that court in favouring and ordaining it; and the court having so decreed, although on other and different grounds, I think, for the reasons I have stated, their judgment should be affirmed, and the appeal therefrom dismissed.

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I am also of opinion that the judgment appealed from should be confirmed.

I have come to this conclusion upon the ground taken by four of the learned judges of the court appealed from, that the second section of c. 21, 37 Vict., of Nova Scotia, has not a retrospective effect. It can be construed as to have a prospective operation only, and must be so construed, upon the universally admitted rule that courts of justice will give all statutes a prospective operation only, unless their language is so clear as not to be susceptible of any other construction.

But I go further than the learned judges, and I say that, if by this statute 37 Vict. c. 21, entitled "An Act to regulate the Precedence of the Bar in Nova Scotia," it was intended to invest the Lieutenant-Governor with the power of superseding the nominations of Queen's Counsel made by Her Majesty at Ottawa or in England, and consequently with the power of setting at naught Her Majesty's prerogatives in the Province of Nova Scotia, as regards Queen's Counsel and patents of precedence at the Bar, then the Act is *ultra vires* and unconstitutional.

Though, with the view I take of the non-retroactivity of this c. 21, 37 Vict., it is not absolutely necessary for the solution of this case that I should consider the constitutional questions raised therein, yet, as they appear on the face of the record to form an important part of the issue between the parties, and have not only been



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considered by the learned judges of the court appealed from, but also have been fully and ably argued before us at the hearing, I feel that I cannot, by deciding the case on minor issues, rid myself of the responsibility of considering these grave and important questions, the determination of which this court has been more specially created for.

It is perhaps better that I should first consider the statute authorizing the appointment by the Lieutenant-Governor of Queen's Counsel in Nova Scotia, 37 Vict. c. 20, as one of the Respondent's contentions is that the Appellants are not Queen's Counsel at all, and that the said chapter 20, under which they claim to have been named as such by the Lieutenant-Governor, as well as chapter 21, under which the Lieutenant-Governor has assumed to give them precedence over the Respondent, is *ultra vires* and inoperative.

This chapter 20 is in the following terms:—

"Whereas the Lieutenant-Governor of right ought to have the power to appoint, from among the members of the Bar of Nova Scotia, Provincial officers who may assist in the conduct of all matters on behalf of the Crown, under the name of Her Majesty's Counsel learned in the law for such Province; and whereas doubts have been cast on the power of the Lieutenant-Governor to make such appointments; Be it therefore declared and enacted, by the Governor, Council and Assembly, as follows;—It was and is lawful for the Lieutenant-Governor, by Letters Patent under the Great Seal of Nova Scotia, to appoint, from among the members of the Bar of Nova Scotia, such persons as he may deem right to be, during pleasure, Provincial officers, under the name of Her Majesty's Counsel learned in the law, for the Province of Nova Scotia."

Now, does this statute authorize the Lieutenant-Gov-

ernor of Nova Scotia to confer the honour and dignity known as Queen's Counsel, the dignity which Her Majesty has, by one of her prerogatives, the right to confer? I do not think so, and I will state why hereafter; but, if such was the intention of the Legislature—if this statute is taken as vesting the Lieutenant-Governor with Her Majesty's prerogative rights of appointing such Queen's Counsel, I hold, then, that it is *ultra vires* and an absolute nullity.

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It is trite to say that the Sovereign is the fountain of honours and dignities. "The Crown alone," says Chitty, "can create and confer dignities and honours. The King is not only the fountain; but the parent of them" (1). It must also be admitted that, in the exercise of that prerogative, the Crown has the right to appoint King's or Queen's Counsel, and to grant letters of precedence to members of the Bar. "To the Crown belongs also the prerogative of raising practitioners in the courts of justice to a superior eminence, by constituting them Serjeants etc., or by granting Letters Patent of precedence to such barristers as His Majesty thinks proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents" (2). And I may here add, that these prerogative rights are rights inherent in the person of the Sovereign himself, which he alone, and without advice or consent, may exercise how and when he pleases. I need hardly add that the Sovereign has this prerogative of conferring honours and dignities over the whole of the British Empire, and that, by the B. N. A. Act, the Crown has not renounced or abdicated this prerogative over the Dominion of Canada, or any part thereof.

I will now proceed to state the grounds upon which I have come to the conclusion that this statute is *ultra*

(1) Chitty on Prerogatives, 107.

(2) *Ib.*, 118.

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*vires*, if the Legislature intended thereby to give to the Lieutenant-Governor the power of appointing Queen's Counsel; I mean here, of course, the rank and honour known under this name throughout the British Empire. I will consider afterwards the appointment of the Provincial officers created by this statute in Nova Scotia under the same name.

It is now conceded, I believe, though the Nova Scotia Legislature seems to have been of a contrary opinion, that the Lieutenant-Governor of Nova Scotia had not, before the statute now under consideration, any such power. Indeed, there is not a single clause, a single word of the B. N. A. Act upon which it can be seriously contended that the Lieutenant-Governors are vested with Her Majesty's prerogative rights of conferring such honours and dignities. It cannot be under section 65 of the Act, which defines the powers of the Lieutenant-Governors. The purport of this section (which applies only to Quebec and Ontario) is to give them the powers previously vested in the Governors, or Lieutenant-Governors, under any Act of the Imperial Parliament, or any Act of Upper Canada, Lower Canada, or Canada, and the dignity of Queen's Counsel does not exist in virtue of any such Act or Acts. It cannot be under section 58. This section merely enacts that:

"For each Province there shall be an officer, styled the Lieutenant-Governor, appointed by the Governor-General in Council by instrument under the Great Seal of Canada."

In fact, nowhere in the Act can a single expression be found to sustain the contention that the Lieutenant-Governor has such a power. Well, if he has not this power in virtue of the B. N. A. Act, how can the Provincial Legislature give it to him? In which clause of the Act can it be found that these Legislatures have such

a right? Which part of section 92, where the subjects left under their control and authority are enumerated, gives them the power to legislate upon Her Majesty's prerogatives? There is a clause, it is true, giving them exclusive authority over the administration of justice, but, surely, the creation and appointment of Queen's Counsel has never been considered as a part of the administration of justice. They have the power to legislate on the Bar and its regulations, but the rank of Queen's Counsel, either here or in England, does not derive and never derived its origin from the Bar, or from the statutes incorporating the Bar, or defining its power and privileges and concerning it. The Legislatures of the different Provinces, before the Union, had also full power and authority over the administration of justice and the regulation of the Bar in their respective Provinces, yet I am not aware that they ever claimed the right to appoint Queen's Counsel. Then, under the rule that Her Majesty is bound by no statute, unless specially named therein, and that any statute which would divest or abridge the Sovereign of his prerogatives, in the slightest degree, does not extend to or bind the King, unless there be express words to that effect (1), even if the power of creating Queen's Counsel could ever have been interpreted to be included in the power over the administration of justice, it remains in Her Majesty, and in Her Majesty alone, as the Imperial statute does not specially give it to the Legislatures. The Legislatures have no more the right to authorize the Lieutenant-Governors to appoint Queen's Counsel in Her Majesty's name, than to appoint them themselves, or authorize any one else in the Provinces to do so. Yet, to contend that they have the right to so authorize their Lieutenant-Governors is to contend, not only that they

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(1) Chitty on Prerogatives, 383.

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can themselves make such appointments, but also that they can authorize any one else in the Province to do so. One is the consequence of the other. If they have it for the Lieutenant-Governor, they have it for any one else. To grant to these Legislatures the exercise of Her Majesty's prerogatives, or the power to give to any one the exercise of these prerogatives, it would require, in my opinion, a very clear enactment, and I cannot find it in the B.N.A. Act. The Appellant's contention, forsooth, is that the Provincial Legislatures have, under Confederation, more extensive powers in the matter than the Legislatures in the different parts of what is now Canada had before the Union. This proposition seems to me quite untenable.

But, said the Appellants, Her Majesty has assented to this Act of the Nova Scotia Legislature. This, in my opinion, is a grievous error. Her Majesty does not form a constituent part of the Provincial Legislatures, and the Lieutenant-Governors do not sanction their Bills in Her Majesty's name. The sections of the B. N. A. Act on the respective constitutions of the Federal Parliament and of the Provincial Legislatures are now so well known that I need not here cite them. But I may perhaps refer to the sections concerning the sanction of the Bills. As to the Federal Parliament, section 55 enacts that:

"Where a Bill passed by the Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the Bill for the signification of the Queen's pleasure."

Now, by section 90 of the Act, this section 55, as regards the Provincial Legislatures, is to be read as follows: "where a Bill passed by the Provincial Legislatures is

presented to the Lieutenant-Governor for the Governor-General's assent, he shall declare, according to his discretion, but subject to the provisions of this Act and to the Governor-General's instructions, either that he assents thereto in the Governor-General's name, or that he withholds the Governor-General's assent, or that he reserves the Bill for the signification of the Governor-General's pleasure."

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And section 56, for the Province, must be read as follows: "where the Lieutenant-Governor assents to a Bill in the Governor-General's name, he shall by the first convenient opportunity send an authentic copy of the Act to the Governor-General; and if the Governor-General in Council, within *one year* after receipt thereof by the Governor-General, thinks fit to disallow the Act, such disallowance (with a certificate of the Governor-General of the day on which the Act was received by him) being signified by the Lieutenant-Governor by speech or message to each of the Houses of the Legislature, or by proclamation, shall annul the Act from and after the day of such signification."

I really do not see on what the Appellants can rely to support the contention that Her Majesty has sanctioned the Act now under consideration. It seems to me that the theory that the Queen is bound by certain statutes because she is a party thereto can have no application whatever to the Provincial statutes. In the Federal Parliament, the laws are enacted by the Queen, by and with the advice and consent of the Senate and the House of Commons. Not so in the Provinces. Their laws are enacted by the Lieutenant-Governors and the Legislatures. The Governor-General is appointed under the Royal Sign-Manual and Signet; the Lieutenant-Governors are not even named by the Governor-General, but by the Governor-General in Council. They are officers

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of the Dominion Government. Their office, as the heads of the Provinces, is a very high and a very honourable one indeed, but they are not Her Majesty's representatives, at least *quoad* the matter now under consideration, and so as to bind Her Majesty in any matter not left exclusively under the Provincial control by the B. N. A. Act. I mean that, admitting the theory that the Provincial laws must be held to be enacted in Her Majesty's name; and I need not consider how far this may be admissible, *this can be so only when such laws are strictly within the powers conceded to the Provincial Legislatures by the Imperial Act*. When they go beyond the limits assigned to them, they act without jurisdiction. Her Majesty's authorization to make laws in her name, which, according to this theory, she has given to them by the Imperial Act, can apply only to the laws passed within the limits assigned to them by the Act. They cannot avail themselves of that authorization to make laws outside of these limits.

The Appellants further contend that, though it may be that the Lieutenant-Governor's sanction is not Her Majesty's sanction, the Act in question, not having been vetoed by the Governor-General, under the clause I have just cited, this is equivalent to a sanction of the Act by Her Majesty.

Well, in the first place, the power of veto is given to the Governor-General in Council, not to the Governor-General himself. And it cannot be contended that the Governor-General in Council is the Queen or the representative of the Queen, or that the Governor-General in Council exercises the prerogatives of the Queen, or can give, directly or indirectly, to any person or public body, the right to exercise such prerogatives. (Of course, I speak here only of the power to grant dignities and honours.) The Governor-General alone exercises the

- prerogatives of the Queen in her name in all the cases in which such prerogatives can be exercised in the Dominion by any one else than Her Majesty herself; so that it is impossible to say that Her Majesty is bound by a Provincial statute, because it has not been vetoed at Ottawa by the Governor-General in Council. It is well known that Provincial statutes cannot be disallowed in England, and that they are not transmitted to the Imperial authority, under the B. N. A. Act, as the Federal statutes are.

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In the second place, a Provincial statute, passed on a matter over which the Legislature has no authority or control, under the B. N. A. Act, is a complete nullity—a nullity of *non esse*. *Defectus potestatis, nullitas nullitatum*. No power can give it vitality. Still less can it get vitality from the mere non-vetoing of the superior authority. In fact, the veto, in such a case, does not add to its nullity. It records it; it gives notice of it, but it cannot avoid what does not exist. *Quod nullum est ipso jure, rescindi non potest*. The Legislatures have the powers conceded to them by the B. N. A. Act, and no others. And no one, no authority (except the Imperial Parliament, of course), either impliedly or expressly, can add to these powers, and give to these Legislatures a right or rights which they do not have by the Imperial Act. If they pass an Act *ultra vires*, this Act is null, whether it is vetoed at Ottawa or not. Still less can it be pretended, as it seems to have been in this case; indirectly at least, that the Imperial Secretary of State for the Colonies could add to the power of the Provincial Legislatures, or, which is equivalent to it, that the statute now under consideration is valid and legal because it has been approved of or authorized in England by a Secretary of State, or the Colonial Office, or because a high officer of state has given his opinion that the Provincial



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Legislatures had the power to pass such a statute. An interpretation of the law in a despatch from Downing Street is not binding on this or any court of justice, and is not given as such. And the despatch referred to by the Appellants does not purport to authorize the Provincial Legislature to pass a statute appointing Queen's Counsel. It merely gives an opinion that they may do so in virtue of the B. N. A. Act. How could any officer, either here or in England, give to the Provincial Legislatures other powers than those they have by the Imperial Act, or authorize the Lieutenant-Governors or any one else to appoint Queen's Counsel in Her Majesty's name, or give to Provincial Legislatures the right to so authorize their Lieutenant-Governors?

So far, I have considered this Nova Scotia statute, 37 Vict. c. 20, as if the Provincial Legislature had purported thereby to vest the Lieutenant-Governor with one of Her Majesty's prerogatives, and to authorize the appointment by him of Queen's Counsel as such are usually named by Her Majesty, or by the Governor-General in her name; and I hold, that if such is the power which the Legislature intended to assume, this Act is *ultra vires* and null.

But, as I have already mentioned, the Legislature of Nova Scotia, it seems to me, did not, by that Act, assume that power, and they have not thereby legislated on this dignity and honour of Queen's Counsel. They have merely appointed Provincial officers connected with the administration of justice. They have guardedly stated in the preamble that it is Provincial officers that, in their opinion, the Lieutenant-Governor ought to have the right to appoint. And in the enacting clause, they simply authorize the Lieutenant-Governor to appoint Provincial officers. Now no one can deny them their right to this legislation. These Provincial officers, it is true, are to

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be known under the name of Her Majesty's Counsel learned in the law for the Province of Nova Scotia. But that does not make them of the rank and dignity of that name grantable by Her Majesty, and the statute does not pretend to make them so. It is a new Provincial office under the name that has been created in Nova Scotia, and nothing more. The Legislature had, in my opinion, full power and authority to do so. They can create Provincial offices for the administration of justice, and call their officers by any name they choose. There can be Provincial officers known as Nova Scotia Queen's Counsel just as well as there can be Provincial officers known as Quebec Knights, Ontario Baronets, or Manitoba Lords. No one, probably, would have the least objection (at all events, it is not the objection raised in this case) to such Provincial titles being taken in the Province by such Provincial officers as would be authorized to do so by the respective Provincial Legislatures, no more than there is any legal objection, in this case at least, to the Provincial officers named in Nova Scotia under the statute in question taking the name of Queen's Counsel, so long as it is not in Dominion Courts, nor anywhere else out of Nova Scotia, and only as members of a Provincial office or order that they lay claim to it, and without assuming to be of the rank of Queen's Counsel known under that name in the Empire. And this may explain satisfactorily why this Act was not vetoed at Ottawa. It may have been considered as creating a Provincial office only, and so not affecting Her Majesty's prerogatives. The Act so taken being constitutional, the Federal authority had no reason for interfering, and allowed the law to stand.

But the Appellants read the Letters Patent naming them, issued under that law, as creating them of the same rank and dignity as the Respondent, who has been

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appointed a Queen's Counsel by Her Majesty through the Governor-General in 1872. That is an error. If they read the statutes, they will see that, though they are called by the same name, it is only a new order or office which was created thereby; and a reference to their Letters Patent will convince them that it is merely of this order or new office that they have been appointed officers: "Now know, that we have appointed and do hereby appoint" Messrs. Lenoir and Haliburton "to be during pleasure—*Provincial Officers*," say their Letters Patent. Evidently, these words "*Provincial Officers*" in the statute and in these Letters Patent have been inserted purposely, because the legislator was not prepared to openly and frankly assert his rights to legislate on one of the Queen's prerogatives, and he felt himself that his powers to do so were very doubtful.

I say, then, that the Appellants are not Queen's Counsel at all in the sense attached to this name in, for instance, the Respondent's commission, and that, for this reason, independently of the reason I gave in the first instance, their appeal, in my opinion, should be dismissed.

Now, as to the other statute, the 37 Vict. c. 21, regulating the precedence of the Bar in Nova Scotia, little remains for me to say. Applying to it the principles which I have enunciated, and which must also govern it, I hold that though it may be legal in the enactment regulating the precedence of the Provincial officers named under the preceding statute between themselves, it is *ultra vires* and unconstitutional inasmuch as it purports to regulate the precedence between Queen's Counsel named by Her Majesty herself, or by the Governor-General in her name, and inasmuch as it purports to give to other members of the Bar precedence over such Queen's Counsel. The Provincial Legislatures cannot, directly or indirectly, interfere with Her

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Majesty's prerogatives, or with her acts done in the exercise of these prerogatives. As remarked by one of the learned judges in the court below, it would be absurd if a scale of precedence could be adopted by the Lieutenant-Governor to-day, to be overruled by another framed at Ottawa to-morrow, and that reversed the next day by a fresh gubernatorial action in Nova Scotia. The learned judge is of opinion that to prevent such absurd consequences, it must be held that the Lieutenant-Governor has the exclusive right of regulating the precedence of counsel in the Province. This, I hold, *cannot be done*. Her Majesty's prerogative rights over the Dominion of Canada, as the fountain of honours, have not, in the least degree, been impaired or lessened by the B. N. A. Act, and Her Majesty, as heretofore, either directly from England, or through the Governor-General from Ottawa, has the right to appoint Queen's Counsel and regulate the precedence at the Bar (1). This the Appellants do not deny, but they claim that the Lieutenant-Governor has a concurrent power to exercise the same right in Her Majesty's name. Well, I repeat it, I cannot see that he has that power by the Imperial Act, and still less that the Provincial Legislature could invest him with it, and authorize him to so use Her Majesty's name. The confusion of powers and conflict of authority which would inevitably ensue if this right could be exercised in the Province as at Ottawa, or in England, cannot have been intended by the Imperial Act.

The Provincial Legislatures have the right to regulate the Bar, but they cannot, by any legislation, either directly or indirectly, limit or lessen Her Majesty's rights or render them inoperative. They cannot, in any degree, lessen or take from the ranks and dignities which it

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(1) Chitty on Prerogatives, 32, 33.

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pleases Her Majesty to establish and confer. It would be a singular state of things, indeed, if a Queen's Counsel appointed by Letters Patent in England or Ottawa by Her Majesty could be the next day superseded in his rank by the Lieutenant-Governor, and put at the foot of the Bar by the issue of new letters of precedence. Yet, such is the Appellants' contention, or, at least, where their contention leads to.

Mr. Ritchie, the Respondent, was duly appointed a Queen's Counsel on the twenty-sixth day of December, 1872, by Letters Patent from Ottawa, under the Great Seal of Canada. On the twenty-seventh day of May, 1876, Letters Patent were issued, under the two statutes, cc. 20 and 21, to which I have referred, by the Lieutenant-Governor of Nova Scotia, purporting to name the Appellants Queen's Counsel, and to give them precedence over Mr. Ritchie. The prothonotary of the Supreme Court of Nova Scotia, subsequently, in making up the dockets, etc., gave the Appellants precedence over Mr. Ritchie. Of this Mr. Ritchie complained to the said court, and obtained a rule *nisi* to confirm the precedence given to him by his Letters Patent of 1872, and to direct that he should have precedence in court over the Appellants. The court granted his demand, and made the said rule absolute in the following terms:—

"It is ordered, that the rank and precedence granted to the said Joseph Norman Ritchie by his Letters Patent of 26th December, 1872, be confirmed, and that he have rank and precedence in this court over all Queen's Counsel appointed in and for the Province of Nova Scotia since the said 26th day of December, A. D. 1872."

From this judgment and rule the Appellants have brought the present appeal to this court. I am of opinion their appeal should be dismissed with costs.

GWYNNE, J.:—

The Respondent has raised three points of objection to the present appeal :

1st. He contends that the order of the Supreme Court of Nova Scotia against which this appeal is brought is not one from which an appeal lies within the meaning of the statute constituting this court; but that order is undoubtedly a final disposition of the matter relating to which it is made, and, if the contention of the Appellants be well founded, materially impairs the legal rights of the Appellants, and does, therefore, clearly, as it appears to me, constitute appealable matter.

2nd. He contends that the Letters Patent by which the Appellants were purported to be made Queen's Counsel were not under the Great Seal of the Province, as they professed to be. It was admitted on the argument, that we have been relieved by an Act of the Dominion Parliament, 40 Vict. c. 4, from the necessity of determining this point, and of entering into the interesting heraldic research which it seemed to open; from this necessity, however, in the view which I take, we should have been relieved independently of that Act.

And 3rd, which is the sole objection on the merits, he contends that the appointment of Queen's Counsel is *ultra vires* of the Provincial Executive, and that the Act of the Legislature of Nova Scotia, 37 Vict. c. 20 (in virtue of which the appointment of the Appellants is, by the Letters Patent under which they claim, professed to be made), is *ultra vires* of the Provincial Legislature. This latter point the Supreme Court of Nova Scotia, while deciding in favour of the Respondent upon other grounds, pronounced to be quite untenable, but, with great deference to the learned judges of that court, it seems to raise a very grave constitutional question.

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It was not disputed, as indeed it could not be, that the right to appoint Queen's Counsel is a branch of the Royal prerogative, that it (equally with the power to grant Letters Patent of Precedence, to make Serjeants-at-law, Judges, Knights, Baronets, and other superior titles of dignity and honour) flows from the fountain of honour, which has its seat and source in the person of Royalty. In England, in point of form, a Queen's Counsel is the standing Counsel of the Queen, retained by her to be of her Counsel in all matters in which she may require his services. Substantially, the title is one of honour and professional rank, conferring precedence upon the person invested with the honour. Though, in point of fact, the recipients of this honour are nominated and selected by the Chancellor for the time being, yet, in point of form, the Queen's pleasure is taken upon their appointment.

In the colonies the appointments were made sometimes, I believe, under the Royal Sign-Manual, but more usually by Letters Patent under the Great Seal of the particular Province of whose Bar the recipient is a member, signed by Her Majesty's representative within the Province, in virtue of the authority vested in him by his commission appointing him Her Majesty's representative, and in pursuance of Royal instructions from time to time given to him, governing him in the execution of the powers vested in him in respect of matters in which the Royal prerogative is concerned.

An Act of Parliament passed by the old Legislatures of the respective Provinces which now constitute the Confederated Provinces of the Dominion of Canada, under the constitutions which they had before Confederation, of which Legislatures Her Majesty was an integral part, as she is of the Imperial Parliament, upon being assented to by the Crown, was competent to divest

Her Majesty of the right to exercise within the Province any portion of her Royal prerogative; but, at the time of the dissolution of those old Provincial constitutions, upon the passing of the B. N. A. Act, and of the creation of the new constitutions under which those Provinces were made members of the Confederation now existing, there had been no Act passed detaching the right to appoint Queen's Counsel from the Royal prerogative, or in any manner impairing or affecting Her Majesty's exclusive right to appoint them. The questions, therefore, which now arise are: Has the B. N. A. Act invested the Lieutenant-Governors of the respective Provinces constituting the Confederation with the right and power to exercise this branch of the Royal prerogative? or has it invested the Legislatures of those Provinces with any control over it? For if Her Majesty is not, by that Act of Parliament, divested of this her prerogative right, it must follow, from the nature of the new constitutions which that Act confers upon the several Provinces, that no Act of any of the Provincial Legislatures thereby constituted can in any manner divest Her Majesty of this or any other branch of her prerogative, or impair or affect her exclusive right to the exercise of it.

It is a well-established rule that the Crown cannot be divested of its prerogative even by an Act of Parliament passed by Queen, Lords and Commons, unless by express words or necessary implication. The presumption is that Parliament does not intend to deprive the Crown of any prerogative right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible.

Now, when we consider the object of the B. N. A. Act, the first thing which occurs to us is, that from anything appearing in it, there does not seem to be any reason or

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necessity for stripping the Crown of its prerogative in respect of the particular matter in question, for the purpose of placing it under the control of the subordinate executive or legislative authorities of the respective Provinces which the Act brings into existence. The particular right in question cannot consistently be vested in the Crown, and also at the same time in either the executive or the legislative authorities of the respective Provinces. To be invested in either of the latter, it must be absolutely separated from the prerogative, for if Her Majesty should still retain the power to appoint Queen's Counsel, or to grant Letters Patent of Precedence, she must retain it in virtue of that prerogative in virtue of which she originally held it. It would be quite anomalous, and unwarranted by anything in the British constitution of an analogous character, and it would be quite derogatory to the Royal dignity, that this power to confer rank and precedence, which, by the constitution, Her Majesty possessed in right of her prerogative, should be shared by her with any subordinate person or authority.

If either authority should have power at pleasure to make appointments superseding those made by the other, the right to confer rank and precedence would in fact rest with neither. In order, therefore, to vest the power in the subordinate, Her Majesty must, *quoad* the power, be divested of her prerogative. Now, does the B. N. A. Act, in express terms or by irresistible inference, divest Her Majesty of this branch of her prerogative?

By this Act, which is the sole constitutional charter of the Dominion of Canada and of the respective Provinces constituting the Confederation, Her Majesty expressly retains all her Imperial rights, as the sole and supreme executive authority of the Dominion, and her position as an integral part of the Dominion Parliament. The Dominion of Canada is constituted a *quasi* Imperial

power, in which Her Majesty retains all her executive and legislative authority in all matters not placed under the executive control of the Provincial authorities, in the same manner as she does in the British Isles; while the Provincial Governments are, as it were, carved out of, and subordinated to, the Dominion. The head of their executive Government is not an officer appointed by Her Majesty, or holding any commission from her, or in any manner personally representing her, but an officer of the Dominion Government appointed by the Governor-General, acting under the advice of a Council, which the Act constitutes the Privy Council of the Dominion. The Queen forms no part of the Provincial Legislatures, as she does of the Dominion Parliament. The Provincial Legislatures consist in some Provinces of such subordinate executive officer and of a Legislative Assembly, and in others of such executive officer and of a Legislative Council and Assembly.

The use of Her Majesty's name by these Provincial authorities is by the Act confined to the summoning and calling together the Legislatures; and, singular as it seems, this is, by the 82nd section, rather by accident, I apprehend, than design, confined to the Lieutenant-Governors of Ontario and Quebec.

By the 91st section it is declared that the Acts of the Dominion Parliament shall be made by the Queen, by and with the advice and consent of the Senate and House of Commons, treating the Queen herself as an integral part of the Parliament, while the 92nd section enacts that the "Legislatures" of the respective Provinces, that is to say, the Lieutenant-Governor and the Legislative Assembly in Provinces having but one House, and the Lieutenant-Governor and the Legislative Council and Assembly in Provinces having two Houses, shall make laws in relation to matters coming within certain

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enumerated classes of subjects, to which their jurisdiction is limited. Nothing can be plainer, as it seems to me, than that the several Provinces are subordinated to the Dominion Government, and that the Queen is no party to the laws made by those Local Legislatures, and that no Act of any of such Legislatures can in any manner impair or affect Her Majesty's right to the exclusive exercise of all her prerogative powers, which she continues to enjoy untrammelled, except in so far as we are obliged to hold that, by the express terms of the B. N. A. Act, or by irresistible inference from what is there expressed, she has, by that Act, consented to being divested of any part of such prerogative.

It is contended that the 92nd section, sub-sec. 14, involves such consent. That sub-section places under the exclusive control of the Provincial Legislatures : "the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts both of civil and criminal jurisdiction, and including procedure in civil matters in those courts."

But, applying the well-established rule as to the construction of statutes, namely, that the Crown cannot be divested of its prerogative by statute, unless by express words or necessary implication, it appears to me to be very clear that nothing in this section can have the effect contended for; for Queen's Counsel have never been, nor can they be, regarded as a necessary element in the constitution and organization of courts either of civil or criminal jurisdiction. Those courts, in fact, were constituted and in perfect organization before ever the title or rank of Queen's Counsel was created, and they could still be conducted in full and perfect efficiency though that rank should never have been conferred. They are not in any sense officers of the courts, nor Provincial officers. In the whole course of Imperial and

Provincial legislation, although courts of justice have been constituted by Act of Parliament, never has provision been made for the appointment of Queen's Counsel as part of the constitution and organization of such courts, nor has it ever been suggested, I venture to say, until now that they form a part of such organization. The power to create this rank or order having, by the constitution, existed always in virtue of the Royal prerogative right to create titles of dignity and honour, the transfer of such branch of the prerogative from the Crown to the Provincial Legislatures could only be effected by language expressed in the most explicit terms. By the 96th section of the Act, the power of appointing judges, who do form a most essential element in the constitution of courts for the administration of justice, is transferred—not, however, to the Provincial, but to the Dominion Government. As to the appointment of Queen's Counsel, nothing is said, nor is there any subject placed under the exclusive control of the Provincial executive or legislative authorities which, by the most forced construction, can, in my opinion, be said *necessarily* to involve the right to appoint Queen's Counsel. The result must therefore be, that the right still continues to form, as it ever has formed, part of the Royal prerogative vested in Her Majesty (who still retains her supreme executive authority over the Dominion of Canada equally as over the British Isles), to be exercised by her at her pleasure, either under her sign-manual, or through the high officer, the Governor-General of the Dominion, who alone within these confederate Provinces fills the position of Her Majesty's representative.

The Provincial statute, in virtue of which the Letters Patent appointing the Appellants are professed to be issued, recites, that the Lieutenant-Governor of right

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*ought* to have the power of appointment. I fail to see, however, by *what right* that officer, who is not by the constitution Her Majesty's representative, *ought* to have the power to confer this title of honour in preference to Her Majesty herself, and to her representative the Governor-General of the Dominion. I presume it will not be contended, that greater discretion in conferring the rank upon the most worthy would be thus secured. The Imperial Parliament, however, is the only power which can vest the right in the Provincial executive, and, if it has not done so, no other power, not even the Provincial Legislature, is competent to say that *of right* the power *ought* to be vested in it.

There are other considerations also which appear to shew the inconvenience of vesting such a right in the Provincial authorities. If vested in them, it might with much force be asked, what right could their Letters Patent confer to entitle the recipient to recognition in this court, or in any other Dominion Court, as, for example, the Maritime Courts or an Insolvent Court, if such should be established? while Her Majesty's appointment can confer the like rank in all those courts, as well as in her Provincial courts, and as well out of those courts as within their precincts.

Then, again, by an old law of the Province of Upper Canada it was enacted, that it should no longer be necessary that commissions should be issued for holding Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery, but that if they should issue, they should contain the names of the Chief Justices and Judges of the Superior Courts of Common Law, and that they might also contain the names of any of the Judges of the County Courts and of any of Her Majesty's Counsel learned in the law of the Upper Canada Bar, one of whom shall preside in the absence of the Chief

Justices and of all the other Judges of the said Superior Courts, and that, if no such commissions should be issued, the said Courts should be presided over by one of the Chief Justices or of the Judges of the said Superior Courts, or, in their absence, then by some one Judge of a County Court, *or by some one of Her Majesty's Counsel learned in the law of the Upper Canada Bar*, upon such Judge or Counsel being requested by any one of the said Chief Justices or Judges of such Superior Courts to attend for that purpose. Now if, by any chance, a gentleman claiming to hold the rank of a Queen's Counsel, in virtue of Letters Patent signed by the Lieutenant-Governor, should preside at a Court of Oyer and Terminer upon the trial of an important criminal case, and the validity of the trial should be called in question, upon the ground that the gentleman presiding was not qualified to sit as a Judge, not having any commission from the Dominion Government conferring upon him the rank of "Judge," and not having any appointment from Her Majesty conferring upon him the rank of "Queen's Counsel," a very embarrassing question might arise, and the ends of justice might be frustrated. Convenience, therefore, as well as the observance of uniformity in the exercise of the power, would seem to concur with other considerations in pointing to the propriety of this branch of the Royal prerogative being maintained, as of old, inseparably annexed to that prerogative, and to be exercised at the sole discretion of Her Majesty, through her sole representative in the Dominion, His Excellency the Governor-General.

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The Provincial Act which contains the above recital proceeds to *declare and enact* that it was and is lawful for the Lieutenant-Governor, by Letters Patent under the Great Seal of the Province of Nova Scotia, to appoint from among the members of the Bar of Nova Scotia

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such persons as he may deem right to be during pleasure Provincial officers, under the name of Her Majesty's Counsel learned in the law for the Province of Nova Scotia.

Now, if "it has been and is lawful" for the Lieutenant-Governor to make Queen's Counsel, it can only be so by the provisions of the B. N. A. Act. If that Act does confer the power upon the Provincial Executive, no doubt the Lieutenant-Governor has it, and a Provincial Act can add no force to the Imperial Act; but if the Imperial Act does not confer the power, then the Lieutenant-Governor has it not, nor can any Act of the Provincial Legislature effectually declare that he has, or by enactment pointing to the future confer it upon him.

The futility of a declaratory Act, passed by a subordinate Legislature, for the purpose of authoritatively defining the intention entertained by the supreme Parliament in the Act which gives to the subordinate its existence, and professing to put a construction upon a doubtful point in the Act as to the powers conferred upon the subordinate, is too apparent to need comment. The office of a declaratory Act is of a nature which requires that it should be passed only by the power which passed the Act, the intention of which is professed to be declared. And as to an Act providing for the future for the extension of the limits of the authority of the Lieutenant-Governor, it is equally plain that no power but the Imperial Parliament, which has set limits to the jurisdiction of the Provincial Executive, can extend those limits and enlarge that jurisdiction.

It has been said that the Crown officers in England at some time have given it as their opinion that the power claimed to be exercised by the Lieutenant-Governor might be conferred upon him by an Act of the Provincial Legislature, of which he himself is a component part. I have

not seen their opinion, nor have I been able to suggest to myself the arguments by which such an opinion could be supported; all I can say, therefore, in the absence of the light of the opinion given, is that, in the best exercise of my own judgment, which I am bound to exercise here to the utmost of my ability with such light as I have, I have been unable to bring my mind to any other conclusion than that the Letters Patent under which the Appellants claim rank as Queen's Counsel, and the Provincial statute in virtue of which those Letters Patent issued, as well as the Act regulating precedence, are, for the reasons above given, null and void, and for this reason I am of opinion that the appeal should be dismissed with costs.

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*Appeal dismissed with costs.*

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JUDGMENTS IN SUPREME COURT OF NOVA SCOTIA.\*

YOUNG, C. J. :† —

Several members of the Bar of this Province, having been appointed by the Governor-General Queen's Counsel after the 1st July, 1867, when the Dominion Act came into operation, questions arose here and in Ontario as to the appointment and precedence of Queen's Counsel, which resulted in two Acts passed in the latter Province in 1873, cc. 3 and 4, and two in our own in 1874, cc. 20 and 21. These Acts closely resemble each other, but differ in some particulars. Our chapter 20, affirming the right of the Lieutenant-Governor to appoint Queen's Counsel, is a declaratory Act, which the corresponding Ontario Act is not. The second clause of the Ontario Act, c. 21, enabling the Lieutenant-Governor to grant to any member of the Bar a patent of precedence in the Courts of that Province, is not in ours, though both Acts authorize the issue of such patents, and all the Acts require that the letters patent for the appointment of Queen's Counsel and for the granting of precedence shall be under the Great Seals of their respective Provinces.

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\* These judgments are printed from the Appeal Book prepared for the appeal to the Supreme Court of Canada. See also 2 R. & C. 450.

† This judgment was concurred in by DesBarres and McDonald, JJ.



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The correspondence which led to these Acts is to be found in the Dominion Sessional Papers for 1873, No. 50, and it is strange that no reference was made to it in the recent argument of this case. Lord Kimberley's despatch of 1st February, 1872, is a public document, having a significant bearing on the point now before us. After stating that a Lieutenant-Governor, appointed since the Union came into effect, had no power to appoint Queen's Counsel, he says, "I am further advised that the Legislature of a Province can confer by statute on its Lieutenant-Governor the power of such appointment, and with respect to precedence and pre-audience, in the Courts of the Province, the Legislature of the Province has power to decide as between Queen's Counsel appointed by the Governor-General and the Lieutenant-Governor, as above explained." It is to be noted that both the Minister of Justice and the Privy Council of Canada recognise the right of Her Majesty directly, as well as through her representative the Governor-General, of selecting from the Bars of the several Provinces her own counsel, and as the fountain of honour, of giving them such precedence and pre-audience in her Courts as she thinks proper. This power, of course, still exists, and it is pointed out by the Privy Council that, when the Supreme Court or other Dominion Courts are established, commissions issued by the Lieutenant-Governor would not, as of right, give precedence or position in those Courts, though it might be advisable that such commissions should be recognised.

Mr. Ritchie's patent, under the Great Seal of Canada, bears date the 27th December, 1872, and by the uniform practice of our Court he had precedence over all the members of the Bar not holding patents prior to his own. But by letters patent dated the 26th May, 1876, purporting to be under the Great Seal of the Province and signed by the Lieutenant-Governor and Provincial Secretary, seventeen members of the Bar were appointed Queen's Counsel for Nova Scotia, and a new order of precedence was established, as it would seem from the recital among the several persons above, that is thereinbefore, appointed, but as it appears from the enumeration, among all the Queen's Counsel previously appointed since the 1st July, 1867, being thirty-three in all, including Mr. Ritchie, and giving precedence and pre-audience above him to several persons who did not enjoy it before. Upon affidavits disclosing the above and other facts, and producing the original commission and letters patent, the rule *nisi* of 3rd of January last was granted and the recent arguments were held.

Among the grounds taken in the rule it is urged that the 20th and 21st chapters of the Provincial Acts of 1874 are *ultra vires*, and the appointments under them invalid and of no effect. But the Crown, through its Secretary of State, having authorized such enactments, and the Acts having gone into operation, this contention is quite untenable.

Another objection, however, is of more avail as regards chapter 21, that it has not a retrospective effect. The second section is as follows: "Members of the Bar, from time to time appointed after the 1st day of July, 1867, to be Her Majesty's Counsel for the Province, and members of the Bar to whom from time to time patents of precedence are granted, shall severally have such precedence in such Courts as may be assigned to them by letters patent, which may be issued by the Lieutenant-Governor under the Great Seal of the Province." At the argument it was vehemently urged upon us that this clause gave the Executive Government an absolute uncontrolled authority over the members of the Bar, so that the youngest and most inexperienced among them might have precedence over the oldest and most eminent who had not become Queen's Counsel previous to the Union. Sympathizing as I do with the reputation and dignity of the Bar, I am unwilling to give to this Act an interpretation so injurious to their feelings and so destructive of their rights. Is the language so strong and so clear as, for the sake of this obvious injustice, to oblige us to give it retrospective operation? Here is a distinction, highly valued, won, in some cases at least, if not in all, by honourable service, and approved by all the world, swept away without fault and without compensation, by giving to an Act of our own Legislature an effect which I think of them too highly to believe that they ever entertained or understood. But what do the true principles of construction teach us as applied to a statute? Shall the construction of this Act be retroactive or prospective? Shall it apply to the past or only to the future? The maxim, *Nova constitutio futuris formam debet imponere non præteritis*, adopted by this court in 1 Oldright, 678, is best illustrated in Sedgwick on Statutory Law, 161-4. A statute which takes away or impairs any vested right acquired under existing laws is to be deemed retrospective. Statutes should have a prospective effect only, unless the language is so clear and imperative as not to admit of doubt. "The principle," said Rolfe, B., in *Moon v. Durden* (1), "is one of such obvious convenience and justice that it must

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always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively." But I am of opinion that such an intention on the part of our Legislature is by no means clear, and therefore that the letters patent, although no question had been raised as to their validity, would not affect Mr. Ritchie's precedence.

But we all know that a very important question did most unexpectedly arise on the first day this case was argued, as to the seal impressed upon these letters, which many obvious considerations oblige us now to consider.

[The remainder of the judgment of the Chief Justice deals with that question, and his conclusion was that a wrong seal had been used, and that the commission in question was void on that ground.]

WILKINS, J. :—

In my view of the case, it is not necessary for me to consider more than the following ground stated in the rule *nisi* obtained by Mr. Ritchie. It is in terms as follows: "Because the Act of the Local Legislature, namely, c. 21 of the Acts of 1874, under which certain barristers were appointed Queen's Counsel by the Lieutenant-Governor of Nova Scotia, by document or letters patent of the 27th of May, 1876, is *ultra vires*." It appears to me that that this contention is, on the clearest principles, without foundation. The statute thus questioned has in effect received the royal assent, and Her Majesty must therefore be considered thereby to have empowered her Lieutenant-Governor to exercise in her name all the powers purported to be conferred on him by the statute. I am unable to conceive in what respects it can be held to involve legislation *ultra vires*. The subject of our enquiry respects the exercise of a right to appoint Queen's Counsel for the Province. I must regard the statute as perfectly valid; and it appears to me that, when it is construed in the only way in which it can be interpreted, the question of precedence before us is disposed of as a legal consequence. The recital of the statute may be, by adding a few words that I distinguish by brackets, paraphrased thus: "Whereas the regulation of the Bar in Nova Scotia is vested (*sub modo*) in the Provincial Legislature, and it is expedient for the orderly conduct of business before the Provincial Courts, that provision be made for the order of precedence of the members of such Bar in such Courts (but saving all rights of precedence heretofore

at any time granted by Her Majesty, or since the first day of July, A.D. 1867, granted by His Excellency the Governor-General of Canada, to any member or members of the said Bar)."

The question which we have to decide arises under the second clause of the statute. That clause must be so construed as not to restrict or interfere with any right of precedence at the Bar, conferred on any member of it, before the passing of the Act, by the Queen—the acknowledged fountain of honour—or by any one duly authorized to confer it by Her Majesty. No such right can be judicially held to be prejudiced by the clause in question, or by the exercise of an authority under it, without violating these fundamental principles recognised as governing the construction of statutes, viz. :—first, that the Sovereign is not bound by a statute by a mere implication of a legislative intention to that effect ; secondly, that vested rights are not taken away by legislation without the plainest evidence of an intention to divest them. It cannot be questioned that Her Majesty has, by assenting to this statute, expressly so far parted with her prerogative right in the subject-matter of the legislation, as to authorize, prospectively, after the passing of the Act, her Lieutenant-Governor of this Province to exercise it to the extent in which it is necessarily conferred on that high officer by the statute. We are bound so to construe this second clause as, while giving full effect to the clear intention, not to adopt a construction that will derogate from any right which, before the Act came into operation, had been granted by Her Majesty or by an authority duly delegated by her. The clause, then, must be so construed as that it shall not be held to have authorized the Lieutenant-Governor to degrade any member of the Bar from that relative position at the Bar which had been specially assigned to him, directly or indirectly, by Her Majesty, in the interval that elapsed between the 1st day of July, 1867—the date of the Union—and the 7th day of May, A.D., 1874, when the statute in question came into operation. The clause under review may be so construed, and effect will still be given to every word in it.

Sub-s. 3 has expressly saved certain rights in the matter of the legislation—rights conferred up to the day of the Union. No reason can be assigned why rights of the same nature and derived from the same source, and granted up to the time of the operation of the statute, were not intended to be saved also. Now, Mr. Ritchie had been appointed one of Her Majesty's Counsel learned

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in the law for this Province on the 26th of December, A.D. 1872, by letters patent under the Great Seal of the Dominion, by the Governor-General in the name of Her Majesty. On His Excellency Her Majesty had before then conferred the right to make such appointments, and by virtue of her undoubted prerogative. Her Majesty's right to do so could no more be questioned than could have been the right granted by Her Majesty to her royal son, the heir apparent, in Her Majesty's name, to bestow honours and titular dignities on selected subjects of the "Empress Queen of India," which right His Royal Highness exercised on the occasion of his visit to the East.

Mr. Ritchie's right of precedence at the Bar under the Governor-General's patent, as claimed by him, existed, and, in my opinion, remained intact, at and since the passing of the statute, and was not in any manner prejudicially affected by the patent granted by the Lieutenant-Governor. His relative position at the Bar must be governed by the patent that he holds, so long as it remains in force, notwithstanding any patent or patents that have been or may be granted by the Lieutenant-Governor of Nova Scotia under the authority of the statute in question.

[The remainder of the judgment of Mr. Justice Wilkins refers to the question of the seal, as to which he differed from the Chief Justice.]

JAMES, J. :—

The task which I have now to perform is, I need hardly say, one which I would gladly have avoided. It is to give my opinion in an important case—a case, as it now stands, virtually decided by this honourable court, of astounding importance—in opposition to that of four judges, all of them my seniors, and three of venerable age and experience, extending over decades of years; and I may well presume, when I consider their ability, learning and experience, that I am wrong in the opinion I am now to deliver. Nevertheless, I have a clear and well-defined opinion on this question, which has been forming and ripening during all the discussions which have taken place. It was but on Saturday afternoon that I became aware, to my great disappointment, that there would be a difference of opinion on the Bench, and that I should occupy the position of being alone in my opinion. Perhaps it would have been better had I accepted the offer so kindly made to me by my learned brethren, of a postponement of the decision, in order to enable me

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to prepare an opinion which would do justice to my own convictions. I have had but a few hours to write my judgment, and therefore I have not been able to attain that end, but I may, perhaps, have succeeded in shewing that there is at least some reason for the results at which I have arrived.

And first, as to the question of Mr. Ritchie's precedence, independently of its relation to the seal. The validity of the precedence granted to Mr. Lenoir and others, against which he contends, depends on the validity, effect and construction of two Acts of the Local Parliament which have been already fully referred to. Their validity, or rather their effect, in transferring the exercise of the royal prerogative was questioned at the argument, but it has been sustained by the opinions of the learned judges who have preceded me, in which I am happy to concur, they having already decided that these Acts are not *ultra vires*, but that they confer upon, or at least confirm in, the Lieutenant-Governor the right to exercise the prerogative of the Crown in the appointment of Queen's Counsel, and in regulating the precedence of the Bar of this Province. I do not consider the first of these Acts at all derogating from or transferring the Queen's prerogative. As the sole fountain of honour throughout her vast dominions, whether on the plains of Hindostan or in the Province of Nova Scotia, this prerogative is still vested in her. But by assenting through her representative, the Governor-General of this Dominion, to this Act, she has rendered legal the exercise of that prerogative by her representative in this Province, without her more immediate intervention either personally or by her officers. This Act I hold not to take away her prerogative, but merely to place the exercise of it in the hands of the Lieutenant-Governor. It is still her royal prerogative, by whomsoever it may be legally exercised.

But I think it is obvious from both of these Acts that in transferring the exercise of her prerogative she intended to do so, and has done so, in a plenary manner. The language of the Acts is as strong, clear and definite as is possible. They profess to give to the Lieutenant-Governor not only the unlimited power of appointing Queen's Counsel, but the unlimited power of regulating the Bar, by giving precedence to such of its members as he shall see fit. I need not enquire whether Her Majesty, by assenting to the first of these Acts, gave up all power of interference with the appointment of Queen's Counsel. Clearly there is nothing on the face of it to restrain the Imperial or Dominion Governments from

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exercising that power, and there is nothing in the exercise of that power by either of these bodies necessarily conflicting with the power of appointment conferred on the Lieutenant-Governor. But when we come to the question of precedence conferred by the second Act, it is obvious that it is a power which could not be exercised by more than one of these bodies without the grossest confusion.

It would be ridiculous to suppose that either Her Majesty or the Legislature intended that a scale of precedence should be adopted by the Lieutenant-Governor to-day, to be overruled by another framed in Ottawa to-morrow, and that reversed the next day by a fresh gubernatorial act in Nova Scotia. Such a state of affairs would be a patent absurdity, which could not be thought of by anybody, and therefore I am clearly of opinion that this Act confers on the Lieutenant-Governor the exclusive right of regulating the precedence of counsel in this Province.

But to what extent? Can the Lieutenant-Governor only regulate the precedence *inter se* of the Queen's Counsel appointed under that Act? Or has he all the power which before the Act was, and still is, vested in the Crown?

I will further observe that the second of these Acts, which I have now under consideration, is quite general in its language; its title is "An Act to regulate the Precedence of the Bar in Nova Scotia," and its preamble is as follows: "Whereas the regulation of the Bar in Nova Scotia is vested in the Provincial Legislature, and it is expedient, for the orderly conduct of business before the Provincial courts, that provision should be made for the order of precedence of the members of the Bar in such cases."

There is not a word in the title or preamble indicating any intention to limit the operation of the Act, nor is there a word in any part of the Act to limit or restrain it except the express limitations in the 1st, 2nd, and 3rd sub-sections, giving precedence to the Attorney-General of the Dominion, the Attorney-General of Nova Scotia, and the Queen's Counsel appointed before July 1st, 1867. All other Queen's Counsel and other members of the Bar, by words as express as the English language can supply, are entitled to such precedence as the Lieutenant-Governor shall from time to time see fit to grant to them, and no more.

But it is objected that this Act, express as is its language, could only refer to such gentlemen as had not received the honorary distinction of the silk until after the passing of the Act; and that to

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give it a larger construction would be to give it an *ex post facto* operation, so as to interfere with vested rights. If it were so, undoubtedly this would be a valid if not conclusive argument against giving the Act the more extended operation which is imported by its clear, express language. But is it the fact that the precedence of a Queen's Counsel is such a vested right and interest that it cannot be taken away without moral wrong and injustice? If it be, then the precedence of every senior member of the Bar is unjustly interfered with when one of its junior members is elevated, by his appointment as Queen's Counsel over his seniors at the Bar. Do we not know—do I need to refer to the abundant authorities cited on the argument, and numerous others, to shew that it is the constant practice for the Crown in England not only to confer these honorary distinctions on junior members of the Bar, by appointing them over their seniors, but to select a particular barrister or junior Queen's Counsel and give him rank over Queen's Counsel of long standing, with no better reason than the Sovereign's will and pleasure? Is this, then, which is ordinary usage and practice of the Crown, an immorality? Is it such an act of wrong and injustice that we must presume, rather than permit it, that an Act of Parliament must be held not to mean what it expressly and positively declares? If it be, then our Sovereign Lady the Queen is in the constant practice of committing the most atrocious acts of injustice—an idea so repugnant that it appears to me to render my argument conclusive. And not only so, but if this be immoral, then the whole Act, from beginning to end, is based on a corrupt and dishonest principle, for its whole scope and essence is to enable the Lieutenant-Governor to do the very thing in all time to come that is now complained of as an act of injustice.

It is true that the Serjeants of the Common Pleas, in 1840, made a gallant stand for their privileges, when, by an order under the Royal Sign Manual, their rights of exclusive audience were interfered with, and barristers from other Courts permitted to plead in that Court, with precedence according to their rank and seniority. The position which they assumed was that the Court itself, as well as the rights of all its officers, were of common law origin, and were fixed by immemorial usage and prescription—that the Serjeants were a part of the Court itself, and had been so from time immemorial, and that the Crown, by a Royal Mandate, could no more abrogate the office of Serjeant, or control its privileges, than it could take away the Court itself or direct that the Serjeants



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should be the Judges. And it was contended by Sir William Follett and Mr. Austin, on behalf of the Serjeants, in arguments of the highest learning and most consummate ability, which I have read with great pleasure, not as in this case, that their rights could not be taken away by Acts of Parliament, but that being fixed by the common law, they could not be taken away by any lesser authority.

But the case of the Serjeants is an exception. In all the other Courts the power of the Crown to regulate the proceedings of the Bar is unlimited. No doubt if this power were exercised in an arbitrary or capricious manner, it would be the subject of grave complaint and dissatisfaction. But such a thing as a Queen's Counsel in England contending that he had a vested right in his precedence, or to place a junior over his head was *per se* an injustice to him, would be, I venture to say, an unheard-of proceeding. I therefore hold, with very great deference to the learned and able Judges who have given their opinions, and who are in all probability in the right, that Mr. Ritchie had no vested interest in his precedence as Q. C., any more than any of his seniors may have had when he, in compliment to his great ability and high standing at the Bar, was very properly elevated over their heads to the Inner Bar; and as I have already endeavoured to maintain the position that Her Majesty intended by that Act to transfer to the Lieutenant-Governor all her prerogative in relation to precedence at the Bar not therein specially excepted, it follows, if I am right in these premises, that this Act having transferred no power which Her Majesty in person, or by her advisers, might not justly and legally have exercised had the Act not passed, no wrong will be done to Mr. Ritchie in holding that the Act is not retrospective in any unjust or improper sense, and therefore ought to be construed according to its plain intent and meaning as expressed by its language.

[The learned judge then proceeded to consider the question of the seal, as to which his judgment was in support of the commission.]

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## SUPREME COURT OF CANADA.

## THE PICTON.

C. J. McCUAIG AND E. B. SMITH.....*Appellants,*

1879\*

AND

DAVID SMITH KEITH.....*Respondent.*

June 16, 17;

Dec. 13.

*On appeal from the Maritime Court of Ontario.**[Reported 4 Can. S. C. R. 648.]**Maritime Court, power to establish in one Province.*

The Act 40 Vict. c. 21 (D), establishing a Maritime Court, with jurisdiction limited to the Province of Ontario, is within the powers of the Dominion Parliament.

Appeal from a decree of the Maritime Court of Ontario, in a case of damage, instituted by the owners of the steamer *Southern Belle* against the steamer *Picton*, the owners intervening.

[The appeal involved certain questions of fact which it is not necessary to detail.]

Mr. *MacLennan*, Q.C., for the appellant:

The first point I will raise is whether the constitution of the Maritime Court was illegal and *ultra vires* of the Parliament of the Dominion of Canada. This is a Dominion court, established to execute Dominion laws in the Province of Ontario. If the power exists under sub-section 2 of section 91, which gives the Dominion Parliament power to legislate about trade and commerce, then it would be competent for the Dominion to create a court which would have exclusive jurisdiction over subject

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\* Present:—Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, J.J.

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matters which are now tried by our Provincial courts. If it is a Dominion court, its jurisdiction should not be limited to one Province.

(THE CHIEF JUSTICE:—If there is one subject matter over which the Dominion Parliament has legislative authority it is this. There is nothing to prevent the Parliament from limiting the territorial jurisdiction of a Dominion court. You might as well contend that the Exchequer Court Act is *ultra vires* because some parts are only applicable to one Province. I do not think this is an arguable point.)

Mr. John E. Rose for the respondent.

[The argument and judgment on the facts of the case are omitted.]

RITCHIE, C.J. (p. 655):—

As to the constitutional question which has been suggested in reference to the court: the 40 Vict. c. 21, which establishes a Court of Maritime Jurisdiction in the Province of Ontario, and gives to all persons the like rights and remedies in all matters (including cases of contract and tort, and proceedings *in rem* and *in personam*) arising out of or connected with navigation, shipping, trade or commerce, on any river, etc., of which the whole or part is in the Province of Ontario, as such persons would have in any existing British Vice-Admiralty Court, if the process of such court extended to the said Province, the B. N. A. Act, section 91, gives to the Dominion Parliament the exclusive legislative authority over these several subjects, and also power to establish courts for the better administration of the laws of Canada. I have not heard a word that in my opinion casts the slightest doubt on the validity of this Act.

HENRY, J. (p. 657):—

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I have considered the objection to the jurisdiction, but THE PIOTON.  
have been unable to discover any reason to doubt that Henry, J.  
the Act establishing the court was *intra vires*.

[Strong, Fournier and Gwynne, JJ., agreed generally  
in affirming the judgment.]

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## ONTARIO COURT OF APPEAL.

1872\*

March 11.

1873

Jan. 8.

*Re* GOODHUE.*Tovey v. Goodhue; Goodhue v. Tovey.*[*Reported 19 Grant, 366.†*]*Jurisdiction of Local Legislatures—34 Vict. c. 99 (O.)—Domicile.*

A testator had devised the residue of his estate in trust for such of his children as should be living at the decease of his widow, and for the children of any of them who should then be dead. Before the widow's death, and on her application and that of the testator's children (all of whom were living), the Provincial Legislature of Ontario passed an Act (34 Vict. c. 99) for dividing the property among the testator's children forthwith. *Held*, that such an Act was within the competence of the Provincial Legislature, but the court held further (Draper, C. J., and Spragge, C., dissenting) that the testator's grandchildren not having been expressly named in the Act and there being no express and explicit enactment specifically referring to and barring their rights, their interests remained unaffected by the Act.

The Hon. George J. Goodhue, the testator, by his will dated 8th December, 1869, devised all his residuary estate, real and personal, to trustees to convert into money, and to accumulate during the lifetime of his widow; and, after the payment of certain anticipated claims thereon, in trust for all the testator's children who should be living at the decease of the widow, in

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\* Present:—Draper, C.J., Spragge, C., Hagarty, C.J., Morrison, Wilson, Gwynne, and Galt, JJ., and Strong, V.C. In the report in 19 Grant, it is stated that Mowat, V.C., was present, but on examination of the papers in the case, it appears that he was not present at the second argument, and took no part in the judgment.

† The statement of the case is abridged from the report in 19 Grant, with one or two variations.

equal shares, and for the child and children of such of the testator's children as might then be dead, in equal shares ; such grandchild or grandchildren to be entitled to the share which his, her, or their father or mother would have been entitled to if living.

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After the testator's death, the widow and children of the testator, by indenture dated 26th September, 1870, after reciting the will, and after other recitals as to the payment of annuities and legacies under the will, and that the residuary estate amounted to more than \$800,000, and that it was desirable that each of such children of the testator should enter into possession of their shares respectively without waiting for the death of the widow, thereby provided for the allotment to each of the testator's children of his and her respective shares. They also stipulated to apply to the Provincial Legislature to confirm the arrangement, and for all necessary and incidental powers. Application was accordingly made to the Legislature by petition, setting forth the will at length, and the names of all parties, infants as well as adults, interested thereunder, for an Act to confirm and validate the settlement which had been so made. Thereupon an Act was passed enacting that the said deed should be confirmed and made valid ; and the trustees under the will were authorized and required to carry into effect the provisions of the Act, and were thereby declared to be saved harmless and indemnified.

One of the trustees under the will refused to carry out the arrangements contemplated by this deed, and confirmed by the statute. Thereupon, a petition was presented to the Court of Chancery by the testator's children, praying that the trustees might submit their accounts ; that a referee might be appointed for making the allotment and distribution provided for by the indenture ; that the trustees might be ordered to carry into

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effect such allotment and distribution when made; and that all proper directions might be given, inquiries had, and accounts taken.

The court, by an order (May 3rd, 1871) granting the prayer of the petition, did "order and direct that the said trustees do bring in and submit to the Master of this court at London proper statements and accounts of so much of the trust estate in the said petition mentioned, as at the date of the passing of the said statute was within the Province of Ontario, and what the same consisted of, and its present condition, and this court doth refer it to the said Master to make all proper enquiries respecting the said trust estate in Ontario as aforesaid, and to take all necessary accounts thereof.

"And this court doth further order and direct that the residue of the said trust estate in Ontario . . . . . be divided into six separate shares or allotments of equal value, in the mode provided by the said indenture and according to the terms thereof."

Against this order the trustee appealed: 1. Because it was beyond the power of the Legislature to pass the statute, and it ought not to have been acted on by the court. 2. Because it appeared that some of the parties prejudicially affected by the statute were domiciled in Great Britain, and others in the United States of America, and never had their domicile in this Province. 3. Because a considerable portion of the testator's estate was not in this Province at the time of his death. 4. Because the order directs the appellant to commit a breach of trust without affording him any protection. 5. (At the second argument, by permission of the court, the point not having been taken in the court below or raised by the reasons for the appeal) That the statute does not take away the rights of the infant grandchildren, or destroy the trusts in the will for their benefit, or

authorize or direct the present division or distribution of any property, real or personal, wherein under the will they have a contingent or other estate or interest.

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A suit was also instituted in the Court of Chancery in the names of three infant grandchildren of the testator, not living in the Province, and by the trustee, against all the children of the testator, and against the several husbands of his daughters, and some of the testator's grandchildren. The bill, amongst other things, set forth, that by the royal instructions the Governor-General was directed to reserve for the royal assent, or to disallow, any bill of an extraordinary nature and importance, whereby the rights and property of Her Majesty's subjects not residing in the Dominion of Canada might be prejudiced. That the petition above stated had not been served on the infant plaintiffs or infant defendants in the respective suits, nor was any notice given them. And it prayed for an injunction against any act or thing by virtue of the order of the court, on the aforesaid petition, or the statute, or the indenture or deed of distribution, and that the indenture of distribution, statute and order, might be declared void, and that the trusts of the will might be carried into effect.

The testator's son, Charles F. Goodhue, demurred to so much of this bill as seeks relief in respect of the orders of the court, as no case is made for relief by the bill, and as the matters thereinbefore specified were adjudicated on at the hearing of the petition.

Some of the other defendants also demurred to the amended bill, on the ground that it made no case for relief.

The Court of Chancery allowed the first demurrer giving leave to amend, and disallowed the second.

The plaintiffs appealed against the order allowing the demurrer, and the other demurring defendants appealed against the disallowance of their demurrer.



1872-3      The case in appeal was first argued in June, 1871,  
*Re* GOODRUE. and, as the judges were equally divided, it was re-  
STATEMENT. argued on March 11th, 1872.

On January 8th, 1878, judgments were delivered in favour of the appellant, all the judges holding that the Act was not *ultra vires*; but the majority allowing the appeal on another ground, Draper, C. J., and Spragge, C., dissenting therefrom.

Mr. Robinson, Q.C., Mr. C. S. Patterson, Mr. Anderson and Mr. Moss, for the appellant.

Mr. J. Hillyard Cameron, Q.C., and Mr. Blake, Q.C., for the respondents.

DRAPER, C. J. (p. 378):—

The first question arises on the first reason of appeal against the order made upon the petition, viz., that it was beyond the power of the Legislature to pass this statute. If the Act can be shewn to be a dead letter, the order founded upon its validity falls lifeless and inoperative. It required an Act of the Legislature to alter a will after the death of a testator, which will was, at the time of its execution, made in strict accordance with the law of the land, and in exercise of his rights and power; for it is not questioned that he had sufficient discretion to make a will, and that he exercised his own free will. He was under no legal incapacity, and it stands admitted that before this Act was passed the will was operative; the estates and interests created and given, vested in the trustees and beneficiaries named; and the very deed by which the children of the testator agree to defeat, as far as in them lies, the accumulation directed by the testator, as well as certain contingent interests given by him to his grandchildren, provides that it, the deed, shall be of none effect unless the Act desired is obtained from the Legislature. . . .

The testator intended that his residuary estate should accumulate during the life of the widow. He intended also that the children of any of his children who died in the lifetime of his widow should take their parents' share, and he provided for both these matters in language as clear as that used by him in making gifts to his children. But his intention evidently has met neither their wishes nor their expectations, and therefore the deed of 26th September, in which there are no other considerations suggested than these—because the residuary estate exceeds \$300,000, because “it is desirable” that the children should get their shares immediately rather than that they should wait for the period fixed by the testator, and because they executed that deed to secure to each child such immediate possession by an immediate division of this large residue, they mutually agree on a mode of division which shall bind them; and because it was “doubtful” whether their arrangements could be legally assented to and carried out by the trustees, by reason of the coverture of several of the parties, and also from the insufficiency of the powers of the trustees under the will, they agree to apply to the Legislature to confirm *their* arrangements, and to compel the trustees to carry them out in place of those stated in the will; in other words, to abrogate the disposing power of the testator after he had unequivocally exercised it, and to take away the possibility which the will had created in favour of grandchildren; in short, to deprive him of powers which the law had given him.

The Legislature have passed such an Act as the parties applying desired. They have, in effect, altered the testator's will—not to supply a defect which rendered it difficult or impossible for his trustees to carry his intentions into effect, but to substitute an intention contrary

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Draper, C. J. to what he has expressed, by rendering the accumulation impossible, and making the division immediate which he directed should await the death of his widow.

No English authority has been cited, nor do I think there is any, which would warrant our denying the power to pass such an Act. There may be cases in which the decisions look in the direction of neutralizing the enactment by construction, or in which a long series of decisions have, as it were, fined away the force of the language used, so as apparently to disappoint the intention of its framers; but they do not apply here.

Among the classes of subjects with regard to which exclusive power is given to the Provincial Legislatures to make laws, we find "property and civil rights in the Province," and "generally all matters of a merely local or private nature in the Province." I cannot say that the present is not a matter belonging to one or other of these classes.

Nor do I think that we can derive any help from American authorities, though there is much to be found full of valuable suggestion to those who wield the legislative power. For as in England it is a settled principle that the Legislature is the supreme power, so in this Province I apprehend that within the limits marked out by the authority which gave us our present Constitution, the Legislature is the supreme power. It is on this principle that private Acts of Parliament are upheld as common modes of assurance, being founded upon the actual or implied assent of those whose interests are affected.

But this power of binding private rights by Acts of Parliament is, as Sir W. Blackstone suggests, to be used with due caution and upon special necessity: as to cure defects arising from the ingenuity or the blindness of

conveyancers, or from the strictness of family settlements, or in settling an estate, as where the tenant of the estate is abridged of some reasonable power, or to secure the estate against the claims of infants or other persons under legal disabilities. In these or the like cases "the transcendent power of Parliament is called in to cut the Gordian knot." The restoration of Charles II. gave rise to a good deal of this private legislation, and at the close of the session (13 Ch. II. 1661) His Majesty observed on the unusual number of private Bills: "But I pray you let this be done very rarely hereafter. The good old rules of the law are the best security. And let not men have too much cause to fear that the settlements that they make of their estates shall be too easily unsettled *when they are dead* by the power of Parliaments" (1).

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"As to what has been said as to a law not binding if it be contrary to reason, that can receive no countenance from any court of justice whatever. A court of justice cannot set itself above the Legislature. It must suppose that what the Legislature has enacted is reasonable; and all, therefore, that we can do is to try to find out what the Legislature intended. If a literal translation or construction of the words would lead to an injustice or absurdity, another construction possibly might be put on them; but it is still a question of construction, and there is no power of dispensation from the words used" (2).

Mr. Sedgwick, in his learned and admirable treatise upon Statutory and Constitutional Law, argues, and I think unanswerably, that the judiciary have no right whatever to set aside, to arrest, or nullify a law passed in relation to a subject within the scope of legislative authority, on the ground that it conflicts with their

(1) Parl. Hist., Vol. IV. p. 247.

(2) Per Lord Campbell, in *Logan v. Burslem*; 4 Moore P. C. C., p. 296.

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*Re GOODHUR.* morality (1).

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Again, Chancellor Kent (2): "When it is said in the books that a statute contrary to natural equity or reason, or repugnant or impossible to be performed, is void, the cases are understood to mean that the Courts are to give the statute a reasonable construction. They will not readily presume, out of respect and duty to the lawgiver, that any very unjust or absurd consequence was within the contemplation of the law. But if it should happen to be too palpable in its direction to admit of but one construction, there is no doubt in the English-law as to the binding efficacy of the statute."

I think nothing is to be gained by a theoretical distinction, which has been suggested, between the authority of the Legislature to pass laws upon certain subjects and the right to exercise that power as they may deem fitting. Whether it be called a power or a right, it comes to the same thing; since, though our Legislature is limited by the Constitutional Act to certain defined subjects, the Act imposes no limit to the exercise of the power on those subjects. It does provide checks, for the Lieutenant-Governor may withhold the necessary assent or the Governor-General may disallow Acts to which his subordinate has assented; but if these powers are not exercised, however self-evident to other minds the propriety or duty of such exercise, and if the new law be within the class of subjects committed to the Provincial Legislature, I know of no authority in Provincial tribunals to refuse to give it effect, applying to its language the same rules of construction that are applicable to any other statute passed by competent authority.

It was observed during the argument that although

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(1) p. 187.

(2) 1 Com. 447.

the Imperial Parliament possessed an entire supremacy in making laws, still that exalted authority could pass no law which was contrary to natural justice. There are *dicta*, no doubt, which apparently sustain that proposition, as that of Coke in *Dr. Bonham's* case; of Hobart, C.J., in *Day v. Savage*; and the remarks of Holt, C.J., in *The City of London v. Wood*. Sir William Blackstone, however, puts this construction upon them: "If the Parliament will positively enact a thing to be done which is unreasonable, I know of no power, in the ordinary forms of the Constitution, that is vested with authority to control it; and the examples usually alleged in support of this sense of the rule, do none of them prove, that, where the main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the Legislature."

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The spirit of this passage applies to the present question.

Very recently, in the case of *Phillips v. Eyre* (1), Mr. Justice Willes says: "A confirmed Act of the local Legislature lawfully constituted whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament" (2).

Again, in *Smith v. Brown* (3), Blackburn, J., observes: "My doubt, however, has been whether the words used by the Legislature were not such as to shew that the Legislature have enacted in a way I think rash and careless, but still have so enacted." I refer also to Lord Tenterden's remarks in *Doe v. Brandling* (4).

(1) L. R. 6 Q. B. p. 20.

(2) See Mr. Justice Boothby's case in 2 Todd's Parl. Government in England, at p. 762.

(3) L. R. 6 Q. B. 729.

(4) 7 B. & C. p. 660.

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Conceding to the fullest extent that the powers of the Legislature of Ontario are defined and limited by the B. N. A. Act of 1867, I conceive that, within those limitations, Acts passed in the mode described by that statute are, as to the Courts and people of this Province, supreme. This Act is within its defined powers, for it is of a local and personal nature, and relates to property and civil rights.

[The remainder of the judgment relates to the construction and effect of the Act 34 Vict. c. 99, and is omitted. His Lordship was of opinion that the interests of the grandchildren were bound by the Act.]

SPRAGGE, C. (p. 417):—[The first part of the judgment is omitted, as it refers only to the construction of the statute. His Lordship was of opinion that it bound the interests of the grandchildren.]

It is made a question whether the passing of this Act by the Legislature of Ontario is not *ultra vires*. I have read the judgment of his Lordship the Chief Justice of this Court upon that point, given after the first argument of the case, and the observations which he has made since the last argument, and I so entirely agree with them that I do not think it necessary to add any observation of my own, except this—that, undoubtedly, as was well observed by Mr. Blake, this power existed before Confederation; that under the Confederation Act it certainly is not given to the Dominion Legislature; and if it is not possessed by the Provincial Legislature, it is a power taken away by implication. The true principle I take shortly to be, that under the Confederation Act there has been a Federal, not a legislative, union; that to the Provincial Legislature is committed the power to legislate upon a range of subjects which is indeed

limited, but that within the limits prescribed the right of legislation is absolute.

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Spragge, C.

I have, I confess, come to a less decided opinion upon the question of domicile than upon any other question in the case. I incline to think that it is the domicile of the trustees that must govern. The view taken of the whole case by a majority of the Court renders it less necessary than it otherwise would be that I should come to a decision upon that point. Upon the whole, I agree in the conclusion arrived at by the Chief Justice of the Court.

HAGARTY, C. J., C. P.:—

[The judgment of Chief Justice Hagarty is omitted, as it refers only to the construction of the Act 34 Vict. c. 99. His Lordship was of opinion that the Act did *not* bind the rights of the grandchildren.]

MORRISON, J. (p. 427):—

I entirely agree with so much of the full and able judgment of the learned Chief Justice of this Court as applies to the power of the Legislature to pass the statute in question, and I concur in the remarks of the Chief Justice made in reference thereto.

[The remainder of the judgment refers to the true construction of the statute, which his Lordship was of opinion did *not* bind the grandchildren.]

WILSON, J.:—

[The judgment is omitted, as it relates only to the construction of the statute. His Lordship concurred with Hagarty, C.J., and Gwynne and Galt, JJ.]

GWYNNE, J.:—

[The judgment is omitted for the same reason. His



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Lordship was of opinion that the statute did *not* bind the interests of the grandchildren.]

GALT, J. :—

[The judgment is omitted, as it relates only to the construction of the statute. His Lordship was of opinion that it did *not* bind the interests of the grandchildren.]

STRONG, V.C. :—

[His Lordship, after expressing his entire concurrence with the judgment of Hagarty, C.J., and stating reasons for holding that the statute, by the true construction thereof, did not affect the contingent interests of the grandchildren, proceeded to observe as follows with respect to the jurisdiction of the Provincial Legislature (p. 452).]

By section 92 of the B. N. A. Act, the exclusive power to legislate is, amongst other matters, conferred on the Local Legislatures as regards "Property and civil rights in the Province," and generally in respect of "all matters of a merely local or private nature in the Province." It must be from one or the other of these sources that the power to pass private Acts of Parliament affecting private property is derived. That the Legislature have that power in all cases where the property and rights sought to be affected are "in the Province," to the same unlimited extent that the Imperial Parliament have in the United Kingdom, I have not the slightest doubt.

In the distribution of the legislative powers just referred to, it must have been intended to confer the right of legislation in private matters, and in matters of property and civil rights theretofore exercised by the Legislature of Canada, either on the Parliament of the Dominion or on the Provincial Legislatures, and there is nothing in the Act shewing an intention to give any part of it to

the Parliament. But the laws to be made by the Provincial Legislatures are confined to property, civil rights, and matters of a local and private nature *in the Province*; so that, although no limitation is imposed as regards the extent to which the Legislature may in their discretion affect private rights within their jurisdiction, they are limited to dealing with rights and property within the Province. Where limited legislative powers are conferred, it must always be the duty of every judicature, when called upon to expound and apply statutes made in the exercise of such an authority, to inquire whether or not the bounds set by the Sovereign Legislature have been exceeded.

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To put a plain case, I will suppose that a Provincial Legislature should assume to confer on a Justice of the Peace out of sessions power to try summarily a charge of felony. It cannot be doubted but that it would be the duty of the tribunal, although the lowest in the scale of jurisdiction, to treat the Act as a nullity.

This has been already so determined in this Province in reference to criminal legislation; and in the case of *Tully v. The Principal Officers of Ordnance* (1), the late Sir John Robinson, C.J., seems to have inclined to the opinion that a statute of the late Province of Canada was void, as being beyond the competence of the Provincial Legislature, who had assumed to deal with certain rights of property vested in the Imperial Government.

It has then been objected that inasmuch as the plaintiffs, the infant children of Mrs. Tovey, one of the testator's daughters, are, and were when the Act was passed, domiciled in England, it was beyond the competence of this Legislature to extinguish their rights in the trust fund created by this will. It will be observed that the will directs an absolute and immediate conversion of all

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(1) 5 U. C. Q. B. 6.

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the testator's estate into personalty, and it is to be retained, invested, and ultimately divided as personalty. The trust estate, therefore, whether actually converted or not, is to be considered as money, moveable property, or personalty from the date of the testator's death; and the rights of the beneficiaries must consequently be determined as though all had been left by the testator in the state of personalty, and the interests conferred by the will had been ordinary pecuniary legacies.

What, then, is the locality of the right which the plaintiffs have of being substituted for their mother in case she should be dead at the time of distribution? Does this right differ in any material respect from the right to recover a legal debt? That the money which may constitute the plaintiff's share is only payable in a certain contingency, and that the payment of it could only be enforced in a Court of Equity, cannot, on any principle which I can discover, constitute any difference between this right of the plaintiffs and an ordinary legal debt, as regards the question of locality. Then it has been determined in the English Courts by decisions never reversed, and which must, as I conceive, give the rule to us, however much foreign jurists and writers on international law have differed on the point, that the locality of a debt is at the domicile of the creditor: *Sills v. Worswick* (1). Such is also the determination of the Supreme Court of the United States, which has held that statutes of bankruptcy do not bind foreign creditors. *Wharton's Conflict of Laws*, s. 528; 2 *Kent's Comm.* (2); *Baldwin v. Hale* (3).

Then if the Legislature of the domicile of the debtor has no power to declare that the foreign creditor's debt shall be extinguished on the creditor being paid his fair proportion of the debtor's whole estate, it surely has not

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(1) 1 H. BL 690.

(2) 9 Ed. p. 503.

(3) 1 Wallace, 222.

the power to declare that the creditor's right shall be absolutely extinguished without even partial satisfaction. 1872-3  
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If the trustees, instead of having taken the wise course which they have followed, had acted on the petitioner's view of the statute, and had dealt with the estate accordingly, what would have been their position if, after the death of the testator's widow and the mother of the plaintiffs, they had been called to account in the English Court of Chancery? The jurisdiction of that Court, at least as regards any of the trustees who might have been served with process in England, could not have been questioned. Strong, V.C.  
      

It would therefore have been incumbent on the trustees so sued to have shewn in their defence, that the interests of the children, at the date of the passing of the Act, constituted property or civil rights within this Province; and this, I am of opinion, on the authorities which I have referred to, and which seem to me to be directly applicable, it would have been beyond their power to do.

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## ONTARIO COURT OF APPEAL

SMILES *v.* BELFORD.

1876\*

Dec. 15.

1877\*

March 17.

*On appeal from the Court of Chancery.**[Reported 1 App. Rep. (Ont.) 436.]**Copyright, right to legislate as to—B. N. A. Act, s. 91, sub-s. 23.*

The B. N. A. Act was not intended to curtail the paramount authority of the Imperial Parliament, as respects any of the matters assigned by the Act to the exclusive jurisdiction of the Dominion Parliament or of the Provincial Legislatures.

All that the B. N. A. Act intended to effect by sec. 91, sub-s. 23, as to copyright, was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as the Act has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the Provincial Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion.

The Parliament of the Dominion has no greater power to deal with the subject of copyright than was possessed by Provincial Legislatures prior to Confederation.

The Imperial Copyright Act, 5 and 6 Vict. c. 45, was in force in Canada at the time of Confederation and is in force in Canada still. It is not affected by the Canadian Copyright Act of 1875, which Act is also in force.

Appeal from a decree of the Court of Chancery (1) (Sept. 25th, 1876) granting an injunction to restrain the infringement of a copyright.

The bill in this case was filed by Samuel Smiles, of the city of London, England, against Robert J. Belford and Alexander Belford, of the city of Toronto, printers

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\* Present:—Spragge, C., and Burton, Patterson and Moss, JJ.A.

(1) *post*, p. 588.

and publishers, setting forth that in November, 1875, the plaintiff had published a book called "Thrift," written by himself, and which was duly entered by him at Stationers' Hall, London, on the 3rd of January following, in pursuance of the requirements of the Imperial statute 5 and 6 Vict. c. 45, entitled "An Act to amend the law of Copyright," and that the defendants had, in defiance of the rights of the plaintiff under that statute, issued a reprint of the work in Canada during the month of April, large numbers of which they had sold at a great profit. The prayer of the bill was to restrain the defendants from thus continuing to infringe the copyright of the plaintiff, for an account of the profits made on the copies of the work already sold, and a reference as to the damages sustained by the plaintiff.

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The defendants answered the bill, admitting the principal statements therein; claiming a right to reprint in the manner they had done, and insisting that the plaintiff had no copyright in Canada by reason of his default to reprint the book here and enter the same in the office of the Minister of Agriculture, pursuant to the Canadian Copyright Act of 1875 (38 Vict. c. 88), which was duly assented to by Her Majesty, and came into force on the 11th of December of that year.

Mr. *Robinson*, Q.C., and Mr. *Beaty*, Q.C., for the appellants.

Mr. *W. N. Miller* and Mr. *C. W. R. Biggar* for the respondents.

BURTON, J. A. :—

An erroneous impression would appear to prevail as to the powers conferred upon the Parliament of the Dominion of Canada by the B. N. A. Act of 1867, in reference to copyright. That impression may have been strengthened by a remark which fell from the learned

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Chief Justice of this Court in delivering judgment in *Regina v. Taylor* (1), which has been referred to in the reasons of appeal as apparently sanctioning that view. I took occasion to state during the argument that, although any opinion emanating from that learned judge was entitled to the greatest respect, the expressions used by him were wholly unnecessary to the decision of that case, and were not concurred in by the other members of the Court.

It is clear, I think, that all that the Imperial Act intended to effect was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as it has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the Local Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion.

I entirely concur with the learned Vice-Chancellor in the opinion he has expressed, that under that Act no greater powers were conferred upon the Parliament of the Dominion to deal with this subject than had been previously enjoyed by the Local Legislatures.

By the 29th section of the Imperial Act, 5 and 6 Vict. c. 45, that Act is extended to every part of the British Dominions, and it was unsuccessfully contended in *Routledge v. Low* (2), that Canada, having a Legislature of her own, and not being directly governed by legislation from England, was not included in these general words.

The 15th section of that Act prohibits Her Majesty's colonial subjects from printing or publishing in the colonies, without the consent of the author (whatever may be their colonial laws), any work in which there is copyright in the United Kingdom.

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(1) 36 U. C. Q. B. 218.

(2) L. R. 3 H. L. 100.

The same Act prohibits the importing into any part of the British possessions any foreign reprint of any book first written or published in the United Kingdom, entitled to copyright therein.

This Act was subsequently amended by the 10-11 Vict. c. 95, and it was then provided that in case the Legislature of any British possession should be disposed to make due provision for securing or protecting the rights of British authors in such possession, and should pass an Act for that purpose, and transmit the same to the Secretary of State, and in case Her Majesty should be of opinion that such Act was sufficient for the purpose of securing to British authors reasonable protection within such possession, it should be lawful for Her Majesty to express her royal approval of such Act, and thereupon, by order in council, to suspend, so long as the provisions of such Act should continue in force in such colonies, the provisions of the 5 and 6 Vict. c. 45, *against the importing, selling, or exposing for sale foreign reprints of British copyright works.*

The Canadian Act, 31 Vict. c. 56, D., was accordingly passed with the object of giving such reasonable protection to authors, and upon its being approved of and assented to by Her Majesty, she did by order in council suspend those provisions of the 5 and 6 Vict. which related to the importing or selling of foreign reprints.

At this time, then, and up to the time of the coming into operation of the recent Act, 39 Vict., the Act of 1875, the 5 and 6 Vict. as modified by the order in council, was in full force within this Dominion—in other words, no one was at liberty, without the consent of the owner of the copyright, to print or reprint the subject of that copyright in any part of the Dominion.

It was conceded that if the colonial Act just referred to (the Canadian Act of 1875) had been reserved for and

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had received the royal assent in the usual way, it could not have the effect of repealing the 5 and 6 Vict. ; but it was contended that inasmuch as it had been confirmed by an Act of the Imperial Parliament, it must be regarded as having the force of an Imperial statute, and that being, as it was contended, inconsistent with the former Act, it must be held to have impliedly repealed it.

But on referring to the Imperial Act we find the reason, and the only reason, alleged for its passage to be the assumed repugnancy of the reserved bill to the orders in council of 1868. Those orders and the modifications which they effected in the provisions of the 5 and 6 Vict. are referred to in the preamble, and after reciting that a bill respecting copyrights had then been recently passed by the Parliament of Canada, whereby provision was made (subject to such conditions as in the said bill mentioned) for securing in Canada the rights of authors in respect of matters of copyright, *and for prohibiting the importation into Canada of any work for which copyright under the said reserved bill had been secured*, it is declared to be expedient to remove the doubts which had arisen as to whether a mere assent would make the bill operative as against the orders in council, which had the force of statutory enactments, and it was therefore desirable to confirm the bill by Imperial legislation.

It is scarcely reasonable to suppose that if the Imperial Parliament had thought fit to accept the Canadian enactment as a substitute for the 5 and 6 Vict., they would not have repealed it, so far as it affected Canada, in express terms, or that when stating a reason for Imperial legislation they would have confined themselves to a reference to the order in council, which dealt only with a portion of the prohibitions referred to in that statute.

I am of opinion, therefore, that they have stated the only reason which rendered it expedient to seek a con-

firmation of the Provincial Act, and that it was intended to preserve intact so much of the Imperial Act as prohibits the printing of a British copyright work in Canada, but giving to the author a further right on certain conditions of securing a Canadian copyright, and thus preventing the importation into Canada of foreign reprints.

Some reference was made upon the argument to the language used by the Secretary of State for the Colonies in introducing the bill. I apprehend that in this as in the case of any ordinary enactment little or no weight could be attached to the language or opinions of individual members of the Legislature or Government, even if there were any mode of bringing that language under our notice judicially; but if it were allowable to refer to the remarks of Lord Carnarvon when introducing the measure, I should say that it seems to favour the view which I have expressed. As reported in *Hansard*, 255 vol. 425, he says the bill did two things: 1. It affirmed the principle that copyright in England should carry copyright in Canada. 2. It would make the owner of an English copyright secure of a copyright for 28 years in Canada on condition of publishing there; by which I understand him to mean that, whilst under the English law the author could prevent the printing in Canada, being still subject, however, to be driven from the Canadian market by foreign reprints, he could, by availing himself of the Canadian Act, make his copyright perfect, as he would thereby acquire the additional right of preventing the importation of foreign reprints.

For he says in a subsequent part of his speech: "The bill is a compromise. He believed most authors and publishers would avail themselves of it. Those who did not wish to do so would keep themselves under the *existing law*, and take their chance of what they might receive under the 12½ per cent. *ad valorem* duty."

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For these reasons I think the decree made by the learned Vice-Chancellor was correct, and that the appeal should be dismissed with costs.

Moss, J. A. :—

I confess that it is not without reluctance that I have arrived at the same conclusion. I fear that the state of the law which we find inflicts a hardship on the Canadian publisher, while it confers no very valuable benefit upon the British author. Its effect, if I rightly understand the matter, is to enable the British author to give an American publisher a Canadian copyright. It is no very violent assumption that every American publisher who treats with a British author for advance sheets of his work, will stipulate for the use of the author's name to restrain a Canadian reprint. By this arrangement he will be enabled to secure the practical monopoly of the Canadian market, for which he may be induced to pay the author some consideration ; but however small this consideration may be, I apprehend it will be found sufficient to induce the author to concede the privilege rather than secure Canadian copyright by treating with the Canadian publisher. But I need scarcely remark, that the possible or probable effect upon a branch of industry, however valuable or important, cannot affect the interpretation which the Court is bound to place upon the statutes by which the subject is governed.

It was contended in the Court below, and stated as one of the grounds of appeal, that by the B. N. A. Act the exclusive right to legislate in relation to copyright was vested in the Parliament of Canada, and that consequently the Canadian Copyright Act by its own intrinsic force superseded the Imperial Act of 1842. This point was not pressed in argument by the learned counsel for the appellants, but was simply suggested for

consideration out of deference to the language used by his Lordship, the Chief Justice of this Court, in *Regina v. Taylor* (1). I believe that his Lordship did not deliberately entertain the opinion which these expressions have been taken to indicate. He simply threw out a suggestion in that direction, but further consideration led him to adopt the view that the Act did not curtail the paramount authority of the Imperial Parliament, but merely conferred exclusive jurisdiction upon the Dominion Parliament as between itself and the Provincial Legislatures.

It must be taken to be beyond all doubt that our Legislature had no authority to pass any laws opposed to statutes which the Imperial Parliament had made applicable to the whole empire. Now it was settled by the highest authority, that a copyright when secured in England extended to every part of Her Majesty's dominions, including Canada: *Routledge v. Low* (2). Except so far as his rights were affected by the Act 10 and 11 Vict. c. 95, and the order in council made under its provisions, he was absolutely entitled to the protection of the Imperial Copyright Act. By that Act he had the sole and exclusive right of printing and otherwise multiplying copies of his work in Canada. The Act of 10 and 11 Vict. did not touch the question of Canadian reprints. It only permitted the importation of foreign reprints upon payment of a duty for the benefit of the author. Independently then of the legislation of 1875, it is clear that the respondent was entitled to copyright in this country, with the single limitation that foreign reprints might be imported. It is equally clear that colonial legislation alone could not have affected his rights.

The Canadian Copyright Act of 1875, if adopted by the two branches of the Legislature and assented to by

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(2) L. R. 3 H. L. 100.

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the Crown in the usual manner, would have been wholly powerless to abridge his existing right. He would still have been entitled by virtue of his British copy-right to restrain any Canadian reprint.

These propositions, which were scarcely contested in argument, narrow the controversy to a consideration of the true scope and effect of the Imperial Act 38 and 39 Vict. c. 53, intituled "An Act to give effect to an Act of the Parliament of the Dominion of Canada respecting copyright." Is its effect to make the Canadian equivalent to an Imperial enactment, so that assuming the terms of the Canadian Act itself to be sufficiently wide to have compelled the British author to comply with its conditions before becoming entitled to copyright, if the British Parliament had been divested of and the Canadian Parliament exclusively invested with the legislative jurisdiction, he is now subject to these conditions? Or is its effect merely to remove a real or supposed difficulty in the way of Her Majesty assenting to the bill in the usual manner, without giving to the Act any greater force or operation than if no difficulty had existed and the usual assent been given?

The more I have considered the case and weighed the able arguments addressed to us, the less doubt have I felt upon the answer that must be given to these questions.

The first recital in the Act is a statement of the effect of the order in council of the 7th July, 1868, made under the authority of 10 and 11 Vict. c. 95, by which prohibitions against the importation and sale of foreign reprints were suspended so far as regarded Canada. This order, therefore, was the first matter to which the author of the bill deemed it necessary to direct legislative attention with the view to a proper comprehension of the measure; and the recital is confined to the announcement of the simple fact that such an order existed.

The second recital states that the Senate and House of Commons of the Dominion had passed a bill intituled "An Act respecting Copyrights," which had been reserved. It is obvious that no special inference can be drawn from this recital.

The third states that by the reserved bill provision is made, subject to such conditions as in the said bill are mentioned, for securing in Canada the right of authors in respect of matters of copyright, and for prohibiting the importation into Canada of any work for which copyright *under the said reserved bill* has been secured.

The significance of this declaration was much debated before us. I do not think that, upon any legitimate principle of construction, it can be held to involve an assertion that a British author is deprived of his rights under the Act of 4 and 5 Vict. and is obliged to subject himself to the conditions of the bill in recital, if he desires to insist upon copyright in Canada. It does no more than state, and so far as it goes correctly state, the purport of the bill. Consider the position of the British author independently of the bill. By the combined effect of the Act 4 and 5 Vict. and the order in council of 1868, he was entitled to a limited copyright in Canada. He could restrain a Canadian reprint, but he could not prevent the importation of a foreign reprint. The bill was to enable him, by compliance with its conditions, to prevent this importation and to secure a perfect Canadian copyright. But there is no trace of an affirmation that if the bill were assented to, the author would be compelled to accept its terms. It is not suggested that if he did not desire the complete copyright which the bill offered, its intention was to deprive him of the measure of protection he already enjoyed.

Thus far the recital has consisted of statements of facts. It now proceeds to mention the ground for appealing to

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Parliament; and that is, that doubts have arisen whether the reserved bill may not be repugnant to the order in council, and it is expedient to remove such doubts and to confirm the bill. This is the reason, and apparently the only reason, given for the passage of the enactment. It seems almost equivalent to a declaration that but for the existence of these doubts, Her Majesty would have dealt with the bill without any reference to the Legislature.

- Nor can I find in the enacting clauses any support for the appellant's contention. It is not declared that the Canadian Act shall have the effect of an Imperial statute. It simply empowers Her Majesty to signify her assent, if she should be so pleased, and enacts that, if her assent is given, the bill shall come into operation at such time and in such manner as shall be directed by order in council. It thus carries out the theory that legislative action was only sought to remove the supposed impediment to executive action.

It was strenuously argued that the terms of the 4th section shewed that copyright in Canada could only be secured under the Act. It declares that where any book in which at the time when the reserved bill comes into operation there is a copyright in the United Kingdom, or any book in which thereafter there shall be such copyright, *becomes entitled* to copyright in Canada, *in pursuance* of the provisions of the reserved bill, it shall be unlawful, without the consent of the owner of the British copyright, to import Canadian reprints into the United Kingdom. The contention is, that this language is repugnant to the notion that the possession of copyright in Great Britain gives any right in this country. I do not think it can be so construed. It certainly implies that the possession of British copyright does not entitle to complete copyright in Canada, as is undoubtedly the case, for it does not prevent the importation of American

reprints. But it does not imply that if the author chooses to remain content with the protection offered him by the Act of 4 and 5 Vict. as modified by the order in council, he shall not be at liberty to do so.

By the 5th section the order in council is expressly preserved in force with regard to books not entitled to copyright in pursuance of the reserved bill. That order, while it removed the prohibition against the importation of foreign reprints, had, of course, left the Canadian publisher under the disability imposed by the Act of 4 and 5 Vict. Under that disability I think he still remains.

I am not prepared to assent to the proposition that we are at liberty to regard the language of Lord Carnarvon when introducing the question to the House of Lords. But if we were, I agree with my brother Burton, that it does not aid the appellants. On the contrary, I think it is strongly in favour of the respondent's view. His Lordship said pointedly that the reason why he was unable to advise the Crown to sanction the Act passed by the Canadian Legislature without the bill he was then proposing, was, that sanction could not be given by order in council to any colonial bill which was repugnant to an Imperial statute, and as the Act of 1847 allowed the importation of foreign reprints on payment of a certain duty, the recent Act of the Canadian Parliament was in form repugnant to it. He added that the repugnancy was only technical. It seems clear that, in his Lordship's view, Her Majesty might, without any Act of Parliament, have assented to the reserved bill and given it full effect, but for the prohibition it contained against the importation of foreign reprints. But as no Canadian Act, although reserved and assented to by Her Majesty, could impair the author's right to restrain a Canadian reprint, which the Imperial Act of 4 and 5 Vict. had given him, it is certain that his Lordship would not have used such

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language if he had deemed that this was the effect of the reserved bill. He would undoubtedly have told the House that the necessity for legislation arose from the Act trenching upon the privileges which the Imperial Copyright Act conferred upon the British author.

I agree that the appeal must be dismissed.

SPRAGGE, C., and PATTERSON, J. A., concurred.

*Appeal dismissed.*

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JUDGMENT IN COURT OF CHANCERY.

[*Reported 23 Grant, 590.*]

PROUDFOOT, V.-C.:—

The Imperial statute 5 and 6 Vict. c. 45, sec. 3, enacted that the copyright in every book which should, after the passing of the Act, be published in the lifetime of the author should endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and should be the property of the author and his assigns.

By the 24th section no proprietor of copyright shall maintain any action or suit, unless before commencing the action he shall have caused an entry to be made in the book of registry of the Stationers' Company, of such book, pursuant to that Act. And by the 29th section it was enacted that the Act shall extend to every part of the British dominions.

It is conceded that this governed the subject of copyright of British authors until the passing of the B. N. A. Act of 1867, but the defendants say that the Imperial Parliament, by this last Act, divested themselves of all power respecting British copyright in Canada. The 91st section conferred on the Parliament of Canada the power of making laws in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces, and declared that the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes therein enumerated, and among these is copyright.

This section 91 is under the division of the statute headed "Distribution of legislative powers." I have not been able to discover anything in the statute conferring any greater powers in this respect on the Dominion and the Provinces than was previously enjoyed by the Province of Canada. There is nothing indicating any intention of the Imperial Parliament to abdicate its power of legislating on matters of this kind. The Parliament of Canada is authorized to make laws "for the peace, order, and good government of Canada." The 14 Geo. III. c. 83, sec. 12, enabled the Council to be appointed under that Act "to make ordinances for the peace, welfare and good government of the Province of Quebec," and the 31 Geo. III. c. 31, created a Legislative Assembly in Upper Canada and in Lower Canada with power "to make laws for the peace, welfare and good government thereof." And the 3 and 4 Vict. c. 35, sec. 3, which united the Provinces, gave to the Legislative Council and Assembly of Canada power in similar terms to make laws for the "peace, welfare and good government of Canada." Under these earlier Acts it was never contended—at all events, it is not now contended—that the Provincial Legislature could make laws at variance with those which the Imperial Parliament might choose to pass and declare to have effect throughout the British dominions; and the language of the 91st section of the last Act has no more ample phrases to indicate larger powers.

The Legislature of Canada, since the B. N. A. Act, recognises the previous Imperial legislation on the subject of copyright as still in force in Canada. Thus the 31 Vict. c. 7, sch. C, had placed upon the list of goods that might be imported free—books, not being foreign reprints of British copyright works,—and by 31 Vict. c. 56, after reciting the 10 and 11 Vict. c. 95 (Imperial Act), which permitted the importation of pirated books into the colonies in case the Legislature should make due provision for securing the rights of British authors, it empowered the Governor in Council to impose on pirated books a duty *ad valorem*, not greater than 20 per cent., and to distribute it among those entitled to the copyright.

In 1872 the Dominion Parliament passed an Act on the subject of copyright, which seems to have contained provisions at variance with the Imperial statute 5 and 6 Vict., and to which the royal assent was refused on the ground that the 5 and 6 Vict. was in force in Canada. I have not seen the Act, as it is not in the Statutes for that year. And when the Dominion Copyright Act of 1875 was reserved for the royal assent, doubts were entertained whether it

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was not at variance with an order of Her Majesty in Council made in pursuance of the Imperial statute 10 and 11 Vict. c. 95, and an Act was passed, 38 and 39 Vict. c. 53, by the Imperial Parliament, to remove the doubts and confirm the bill.

I think, therefore, that the Imperial statutes on the subject of copyright were in force in Canada until the Act of 1875 came into operation (11th December, 1875). It remains to be seen what effect this Act, confirmed by the Imperial Parliament, has upon the subject.

It enables any person domiciled in Canada or any part of the British possessions, etc., who is the author of a book, etc., to have the sole right of printing, reprinting, publishing, and vending such book, etc., for twenty-eight years from the time of recording the copyright, upon condition that the book shall be printed and published, or reprinted and republished in Canada, but in no case shall the exclusive privilege continue in Canada after it has expired anywhere else.

The recording of the copyright is provided for by section 7, and other sections make provision for interim copyright pending publication in Canada.

I have no doubt that under this Act British authors may obtain Canadian copyright, conferring upon them the exclusive right of printing, publishing, and vending in Canada, and thus effectually prohibit the importing, printing, publishing, or sale of pirated copies. (Section 11.)

But I find nothing in the Act purporting to extinguish the copyright of a British author who does not choose to obtain Canadian copyright. The 5 and 6 Vict. is not attempted to be repealed either by this Act or by the Imperial statute confirming it. If he does not obtain copyright here, and relies upon his British copyright, he may prevent the reprinting of his work here, but he cannot prevent the importation of pirated copies printed elsewhere, and can only ask for the 12½ per cent. duty imposed on such copies under the 31 Vict. c. 56.

There is nothing repugnant to the 5 and 6 Vict. in our Act of 1875; they may both well stand together. But it is repugnant to the order of Her Majesty in Council, under the 10 and 11 Vict., which permitted pirated copies to be imported on payment of a duty, while our Act says, if copyright is secured here pirated copies shall not be imported, and it was on this account that an Act had to be obtained to confirm it.

The 4th section of the confirming Act was referred to as shewing

it was contemplated that British authors would have to obtain Canadian copyright. But it only provided, in the interest of British publishers, that no one but the owner of the copyright should import into Britain copies published in Canada of any British copyright book ; but it contains nothing to qualify or abridge the British copyright if the author is contented to rely upon it.

In the view I have taken of our Act of 1875 it is unnecessary to consider whether the copyright in Britain is obtained by publication alone, or if registration at Stationers' Hall is not essential. For if it is only upon registration that an author becomes entitled, the plaintiff's book was registered, and although it was after the Act came into force, yet it is optional with him to secure copyright here. But I am quite prepared to hold that registration only affects the right of suit or action, not, as it was contended, for the penalties only, but of any proceeding for the protection, or to prevent the infringement of the copyright. The 24th section of the 5 and 6 Vict. seems to me expressly to declare this. And in *Murray v. Boque* (1), Kindersley, V.-C., says : " So that, as to books first published after the Act, although the author has the copyright in them, he cannot sue, either at law or in equity, to protect himself against infringement of the Act, unless he has registered his book at Stationers' Hall."

The motion for an injunction was by consent turned into a motion for a decree.

The bill prays for an account of the profits made by the defendants from the sale of the books, and that the damages which have been sustained by the plaintiff from the sale of the books may be ascertained, and for an injunction.

I think the plaintiff entitled to an account of the profits from the sale of the books, and to an injunction, and the decree will be accordingly. I give no account of the damages caused to the plaintiff by the sale, as it seems to me to be impossible to ascertain them. The inquiry could not proceed on the assumption that every one who bought a copy of the cheap edition would have bought one of the more costly ; and if some assumption of that kind were not made, there would be no data from which to ascertain the damages.

The plaintiff would have been entitled to an order for the delivery to him of the unsold copies, but as he has not asked it, I presume he does not desire it.

The defendants will pay the plaintiff's costs.

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## ONTARIO COURT OF APPEAL.

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Sept. 4.

1878\*

March 30.

LEPROHON v. THE CORPORATION OF THE CITY OF OTTAWA.

[Reported 2 App. Rep. (Ont.), 522.]

*Jurisdiction of Local Legislature—Power to tax income of  
Dominion officer—Assessment law.*

A Provincial Legislature cannot impose a tax upon the official income of an officer of the Dominion Government, or confer such a power on the municipalities.

This was an appeal from the judgment of the Queen's Bench, reported 40 U. C. Q. B. 478, making absolute a rule *nisi* to set aside a verdict for the plaintiff and enter a verdict for the defendants.

Mr. C. Robinson, Q.C., for the appellant.

Mr. M. C. Cameron, Q.C., and Mr. Bethune, Q.C., for the Respondents.

The following authorities were cited:—

For the Appellant: *Sulley v. The Attorney-General* (1); *Udney v. The East India Co.* (2); *Veazie Bank v. Fenno* (3); *Reg. v. Hills* (4); *Re Goodhue* (5); Cooley on Taxation, 48, 51, 61; Pomeroy on Constitutional Law, 190-2; Hilliard on Taxation, 148; Senior on Income Tax, 128; *Bank of Commerce v. New York City* (6); *L'Union St. Jacques de Montreal v. Belisle* (7); *Reg. v. Wood* (8); *Saunders v. Evans* (9); *Osborn v. United States Bank* (10);

\* Present:—Spragge, C., Hagarty, C.J.C.P., Burton and Patterson, J.J.A.

(1) 5 H. & N. 711.

(2) 13 C. B. 733.

(3) 8 Wallace, 533.

(4) 2 E. & B. 176.

(5) 19 Gr. 366.

(6) 2 Black, 620.

(7) L. R. 6 P. C. 31.

(8) 5 E. & B. 49, 55.

(9) 8 H. L. C. 721-729.

(10) 9 Wheaton, 738, 859, 860.

*Brown v. State of Maryland* (1); *Bank Tax Case* (2); B. N. A. Act, s. 91, sub-s. 8; s. 92, sub-s. 2; ss. 130, 131.

For the Respondents: *In re Venour's Settled Estates* (3); *Dennison v. Henry* (4); *Thomson v. Pacific Railway* (5); *Trustees of the Methodist Church v. Ellis* (6); 29 and 30 Vict. c. 53, ss. 4, 8, 9, 10, 36, 40; 16 Vict. c. 182, s. 5; Municipal Act of 1866, s. 225; B. N. A. Act, ss. 90, 125, 129; s. 92, sub-ss. 8, 13 and 16; 32 Vict. c. 36, ss. 4, 5, 8, 9, 10, 35 and 39; 34 Vict. c. 18, s. 1, O.; Maxwell on Statutes, 264.

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ARGUMENT.

SPRAGGE, C.:—

This suit is by an officer of the House of Commons of the Dominion of Canada, against the Municipality of the City of Ottawa, and raises the question whether it is within the power of the municipality to tax, for municipal purposes, the salary of the plaintiff, derived from his appointment as an officer of the House of Commons.

We are informed by counsel for both parties, that it is not their wish that any distinction should be drawn between the position of the plaintiff and that of the ordinary civil servants of the Dominion Government, but that this suit be taken as a test question, applying to all the officers of the Government of the Dominion, so far, at least, as they can make it so.

The questions involved in this appeal have been very fully and ably discussed at the bar, as well as in the judgments given in the Court below, and by Mr. Justice Moss at the trial of the cause: so fully, indeed, that I do not find it necessary to go at such length into the question raised as I otherwise should do; and I do not propose to discuss at all the question whether the plaintiff's

(1) 12 Wheaton, 436, 445.

(2) 2 Wallace, 200.

(3) 2 Ch. D. 522.

(4) 17 U. C. Q. B. 276.

(5) 9 Wallace, 579.

(6) 38 Ind. 3.

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salary was exempt under the words of sub-s. 12 of s. 9 of the Ontario Assessment Act of 1868-69, 32 Vict. c. 36, O., exempting "any salary derived by any person from Her Majesty's Imperial Treasury, or elsewhere out of this Province." I propose to discuss the general constitutional question only. Our function upon this appeal is, in my view, only that of interpreters of the constitution under which we live and are governed—the B. N. A. Act.

The powers of the Dominion Legislature and of the Provincial Legislature are distributed in classes assigned to each—the Provincial Legislature having only the powers specifically conferred; the Dominion Legislature having, besides those specifically conferred, all powers not specifically conferred upon the Local Legislature. It would seem to follow that Acts of the Provincial Legislature which conflict with the powers conferred specifically or generally upon the general government are *ultra vires*; so, on the other hand, Acts of the Dominion Parliament or Government conflicting with powers conferred exclusively upon the Provincial Legislature would be *ultra vires*—would be acts of usurpation. This must result from each being creatures of the one power; each deriving its authority from the one source.

For executing the functions assigned to each, some machinery was necessary, and an essential part of it would be executive officers; and so we find, in the clauses of the Act distributing functions and powers to the Dominion and to the Provinces respectively, provision is made accordingly. For the Dominion, in class 8, s. 91, in these terms: "The fixing and providing for the salaries and allowances of civil and other officers of the Dominion of Canada;" and for the Provinces in class 4 of s. 92 in these terms: "The establishment and tenure of Provincial offices, and the appointment and payment of Provincial officers."

Other clauses of s. 92 have also been referred to as bearing upon this question. By sub-s. 2, authority is given to Provincial Legislatures for "direct taxation within the Province in order to the raising of a revenue for Provincial purposes."

Sub-s. 8 has "Municipal institutions in the Province."

Sub-s. 13, "Property and civil rights in the Province."

Sub-s. 16, "Generally all matters of a merely local or private nature in the Province."

Certain powers are given in terms, and certain powers must arise by implication from the conferring of powers to deal with certain matters, upon the principle that general powers being given in respect of a certain subject matter, these powers carry with them all that is necessary for their due execution.

To apply this to the case of municipal institutions. The raising of money is necessary for their due and effectual working; and the giving to them the power to raise money by taxing inhabitants of the municipality for municipal purposes would seem to be within the power of the Provincial Legislature. There is, at the same time, an implied limitation upon every power conferred, whether conferred in terms or by implication, that it must not encroach upon or interfere with the powers conferred elsewhere. To apply it to the case before us, the power to tax, whether by Provincial Legislatures directly, or the municipal bodies empowered by the Legislature, is limited by this implied disability.

What the Legislature of Ontario has done (assuming it for the present not to be *ultra vires*) has been to declare income to be personal property, and to make land and personal property liable to taxation for municipal purposes; at first continuing an exemption then upon the statute book, and then by a subsequent Act, the Act of 1871, abolishing that exemption; leaving incomes of Dominion

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as well as Provincial officers, as a rule, liable to taxation as a species of personal property. Indirectly the Legislature has done this: it has enacted that all incomes (with some exceptions that do not apply here) shall, under the name of personal property, be liable to taxation for municipal purposes, and that the salaries given by the Dominion to its officers shall be no exception. It is not quite accurate to say that the tax is upon an inhabitant of a municipality, *qua* inhabitant. It is upon the salary of a Dominion officer, whose official duties make it necessary, or at least proper, that he should reside in a certain municipality. Residing there, his salary for services to the Dominion is taxed.

The function of the Dominion in regard to its officers is thus defined: "The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada;" in other words, to fix the amount and mode of compensation, and to provide for its payment. I premise that the Provincial Legislature cannot do indirectly what it cannot do directly. If it cannot impose a direct tax upon public salaries, Dominion as well as Provincial, it cannot empower municipalities to do so, under the name of personal property or otherwise.

Among the powers of the Provincial Legislature is this: "Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes." It would, I apprehend, be within the competence of a Provincial Legislature, under this power, to impose a *pro rata* tax upon all salaries given to *Provincial* officers. It would be so because it would be acting upon those over whose salaries they have control. But suppose such tax imposed upon the salaries of all officers of Government, Dominion as well as Provincial, it would raise a very different question; it would impose a burden upon the

salary of the Dominion officer. The salary fixed by the proper authority of the Dominion Government would be subject to reduction by Provincial authority.

There would, moreover, be an incompatibility between the action of the two authorities. One, the Dominion Government, fixes the salary of a certain officer at a certain amount, being, it is to be presumed, a proper compensation, and no more than a proper compensation, for the duties he is to discharge; another authority, a Provincial Legislature, intervenes and reduces the amount below what is fixed as a proper compensation, and does this in the case that I am putting in order to the raising of a revenue for Provincial purposes.

If it be said that the Dominion Government, in fixing the amount of salary, would take into account all that the recipient of the salary would have to bear, not only household expenses, servants' wages, rent, fuel, and the like, but also taxes, we may take as a test the case of taxes imposed to raise a revenue for Provincial purposes. The Dominion Government might well object that it was only a mode of taking a portion of the revenue of the Dominion to assist in the raising of a revenue for Provincial purposes; and palpably it would be so—indeed so plainly so that a tax in such terms would scarcely be pressed. But suppose a general income tax passed by a Provincial Legislature in order to the raising of such a revenue, and we had to deal with a claim for exemption by an officer of the Dominion, could we fail to see that the necessary effect of such a tax upon him was either diminishing the amount fixed by the Dominion Government as proper compensation, so intervening between the Dominion and its servants in a matter strictly within its competence? And supposing it argued that such tax was probably taken into account in fixing the amount of salary, would not the answer be that that could not be

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assumed, as it would be taking a portion of the revenue of the Dominion to aid in raising a revenue for Provincial purposes? If this could not be done by way of direct taxation for Provincial purposes, can it any more be done in order to the raising of a revenue for municipal purposes? It would be conferring upon municipalities a power not possessed by the body by whom the power was assumed to be conferred. It may be put thus: the power to tax directly the salaries of Dominion officers is not possessed by a Provincial Legislature, but a Provincial Legislature may confer such power upon municipal bodies. This would at once stand condemned as an illogical proposition.

It has been put by the advocates for the imposition of the tax, that the question is a very trivial one; that it is idle to suppose that a State would not be as well served if its officers have to pay municipal taxes as if they are exempt. I do not know that it can be said that municipal taxes in cities (and Government officers as a rule must live in cities) are so light as not to be felt to be burdensome by those who pay them. If a man's salary is measured by his necessities, taxes not being taken into account, taxes would be a burden not counted upon and not provided for. A truly conscientious man would serve the State as faithfully and perhaps as well though the burden might be heavier than he had counted upon, but it is not desirable in the interest of the State that its servants should be underpaid; the tendency, be it great or small, is to impair their efficiency, and so to lessen their value as public servants.

As public servants, they are an essential part of the means and instruments by which the government of the Dominion is carried on; and the question is not whether they will discharge their duties, although burdened with municipal taxes, but whether a Provincial Legislature

has the power to impose a burden upon any instruments by which the Dominion Government is carried on.

The position of the civil servants only of the Government has so far been considered, but the Dominion has other than civil servants. Among the duties committed by the Constitution to the Dominion is that relating to the "Militia, Military and Naval Service, and Defence." The pay of officers of Her Majesty's service is exempt from municipal taxation by the Ontario Acts of 1866 and 1869. The Dominion has exclusive jurisdiction also in matters of navigation and commerce. The service of all officers employed on these duties is for the benefit of the whole and of every part of the Dominion. Suppose a military force embodied, or a naval force constituted, would the pay of the officers, wherever stationed, be subject to taxation for municipal purposes? It would seem strange if they were; yet their position is substantially the same as that of the civil officers of the Dominion. All are alike means and instruments by which the affairs of the Dominion are administered.

I have referred to the conflict of authorities, Provincial and Dominion; the encroachment by the former upon the functions of the latter, as defined in our Constitutional Act; and the anomalies to which, in my opinion, the claim of the defendants leads. The question is not one of degree, but of principle; the principle being that a tax by or through a Provincial Legislature, upon the means or instruments by which the Dominion Government is carried on, is *ultra vires*, and therefore void.

I have explained shortly the reasons which have led me to this conclusion, without referring, so far, to the American cases upon like questions arising in the United States. Those cases, without being authorities in the sense that the decisions of the Courts of the mother country are authorities binding upon us, are yet entitled

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to the highest respect. They are the judgments of very eminent jurists, whose minds have been trained to the consideration of these and cognate questions, from the frame of their Constitution, with powers of government distributed, some to a federal authority, and some to governments of States, analogous generally to the allotment of powers with us, some to the Dominion and some to the Provinces, with this difference, that powers not specified reside in the several States, as well as those specifically committed to them, while only those specifically committed to the Federal Government belonged to that authority. The converse is the case in our Constitution, and the difference makes the American decisions *a fortiori* in favour of the principle affirmed by them; perhaps I should rather say that the principle is, if anything, more free from difficulty in its application to our Constitution than to that of the United States.

I have examined these American cases with great attention, and could not fail to be struck with the great erudition and ability displayed in the masterly judgments delivered by the very learned judges before whom they were heard and adjudicated upon.

Many passages from these judgments appear in the published reports of judgments delivered in this case, and others are quoted in judgments to be delivered in this case by learned judges in this Court. That being the case, I do not propose myself to quote from the American cases, but content myself with expressing my high appreciation of their great merits and value, adding only this, that the process of reasoning upon which the judges in these cases proceed is, in my humble judgment, incontrovertible.

My opinion is, that the judgment of the Court below should be reversed, and that the plaintiff is entitled to a verdict, and that the judgment should be for full costs.

HAGARTY, C. J. C. P.:—

The general subject has been so fully discussed in the judgments already delivered here and below, that I wish to confine my remarks into as narrow a compass as possible.

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Before and at Confederation, the power to tax in the Parliament of Canada was unlimited.

Income derived from office was unquestionably assessed and assessable under certain exceptions, covering the plaintiff's case. The claim against the plaintiff rests therefore wholly on the legislation of the Ontario Parliament.

The much-discussed sub-s. 12, of s. 9, in the Act of 1866, copied into the Local Assessment Act, c. 36 of 32 Vict., when it speaks of a pension, salary, etc., derived from the Imperial Treasury or elsewhere out of this Province—*i.e.*, Canada as it was then—left the whole class of merely Canadian officials unaffected.

But when the same words were used by an authority limited to Ontario, it becomes important to consider whether the plaintiff is not necessarily included in the exemptions. He is certainly a person with a salary derived out of this Province of Ontario.

It is contended with much force that the whole exemption clause refers to Her Majesty's military and naval service, and that we must regard the special intent of the clause to control any apparent generality of the language used.

The words, to my mind, are unquestionably wide enough to reach the plaintiff's case. If soldiers, sailors, or in fact any Imperial agents or servants, be alone intended, the reference to the Imperial Treasury would have been quite sufficient. The words, "or elsewhere out of this Province," *i.e.*, Ontario, would be wholly needless if Imperial agents be alone affected by the clause.

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The clause must be either confined to the army and navy, or the general words would seem to prevail. If we do not confine it to the two services, then it must cover all salaried officers and pensioners of the Imperial Treasury, military and civil. The military have been already provided for by the words "full or half pay."

If the Imperial Government had any civil servants under pay in Ontario, I think the words would certainly apply to them. But as such civilians are included, can we exclude all other civilians drawing salary "elsewhere out of Ontario?"

A Dominion official, doing duty for the Dominion in Ontario, would seem to be as much out of the reach of the Ontario taxes, as an Imperial official resident therein.

For many years, I understand, in the United States, municipalities have been allowed to assess income; but in England such power is only exercised by the State for national purposes, and it has been always spoken of as a great resource in exceptional emergencies. It is not easy to understand the principle on which such a property is made a subject for taxes of a purely local character.

I do not desire to discuss the wisdom of such a law. I content myself with remarking that, to my understanding, it is wholly unintelligible how it is brought within the grasp of a merely local rate. I only notice this as it bears upon the widening or the narrowing of our judicial interpretation of this exemption clause.

Unassisted by a reference to any other parts of the statute, I think we would naturally construe this clause so as not to credit the Legislature with the intention of allowing each city or township municipality to assess for local rates all the salaries of Dominion officials happening to reside therein. But a perusal of the whole Assessment Act leaves, in my mind, an impression that

the Ontario Legislature considered that it had the right to tax salaries derived from sources outside its jurisdiction, otherwise they have exhibited needless caution in specifying exemptions.

They declare the official income of the Governor-General and also of the Lieutenant-Governor to be exempt; also, immediately following the exemption clause, so much already discussed, they exempt all pensions of \$200 a year and under, payable out of the public moneys of the Dominion of Canada or of this Province. But they go further in caution by declaring as the first of exemptions, "All property vested in Her Majesty," etc., etc., which, by sec. 125 of the Federation Act, was declared not to be liable to taxation. It may be that this particularity in exemptions was designed to facilitate the operations of the assessors, and not as indicative of the assertion of a right to legislate on the subject.

When, in the subsequent Act, the Legislature specially repealed the exemption clause as to government officials, we must naturally suppose that they understood it as a subject within their powers.

I do not feel clear as to the complete application of the ordinary rules of construction of statutes being fully applicable to the statute of a Legislature not possessing, as it were, *legal omnipotence over* the subject-matter.

A glance at the rules of construction elaborately stated in such cases as *Hawkins v. Gathercole* (1), and the very late decision of *River Wear Commissioners v. Adamson* (2), (judgment of Lord Blackburn), may perhaps suggest some difficulties as to the application of these rules to the laws of a limited jurisdiction.

I prefer, however, to rest my decision on a broader ground.

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(1) 6 DeG. M. & G. 1.

(2) 2 App. Cas. p. 762.



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We must take the Confederation Act as a wholly new point of departure. The paramount authority of the Imperial Parliament created all the now existing Legislatures, defining and limiting the jurisdiction of each. The Dominion Government and the Provincial Governments alike spring from the one source. For the purposes of our present discussion, I see no practical difference in the principles governing the relations of these new jurisdictions and those that have been declared to regulate the relative authorities of the United States and the several State Governments.

Whether the governing principles be set forth in the written Constitution of the United States, or be embodied in an Act of Parliament passed by paramount authority, as in our case, creates no difficulty, in my mind, as to the application of the broad principles laid down by the distinguished American jurists so often referred to in this discussion. Our law books are necessarily almost barren of authority on the subject of limited Parliamentary jurisdiction. It is to the Marshalls and Storys of the neighbouring Republic, and to their successors in that Court which is still true to the traditions of the best age of American jurisprudence, that we have to look for guidance and assistance on a subject most familiar to them—most unfamiliar to us.

We must bear in mind that the class of officials sought to be taxed owe their existence to the new state of things. No such officers existed prior to Federation. The plaintiff is an officer of a new organization, and bears, in my view, a wholly different position from an officer of the superseded Parliament of Canada, which was the sole source of legislation for Ontario. The Dominion Government have to appoint numerous officers to carry out their peculiar functions and jurisdictions, and who, for such purposes, have to be resident in various parts of Canada.

Sec. 91 of the Federation Act gives to that Parliament the exclusive jurisdiction of (sub-s. 8) "Fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." The same Act, s. 92, sub-s. 2, gives to Ontario the exclusive right of "Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes."

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Can this latter right be exercised on the salary of the Dominion officer fixed by his Government?

If it can be at all, it can of course to an unlimited extent. According to the decisions of the United States Supreme Court, the exercise of such a right would impair, if not defeat, the operations of the Federal authorities. I need not repeat the language on this head cited in judgments already delivered.

Then, when we look at the right given to the Provinces of "Direct taxation within the Province," can these words legitimately extend to such a subject-matter as an income derived wholly or partially without the Province? If, for example, the Government of Nova Scotia chose to employ an agent for emigration or other purposes at Toronto, could the salary paid to him by his employers be properly a subject for taxation within Ontario? The ordinary meaning of such words would, I think, apparently be taxation on persons and property within the Province.

If such be the true meaning, such an income cannot be brought within the grasp of the collectors of local rates, by the Legislature of Ontario attaching any definition it pleases to such a word as "Income." The last illustration rests wholly on the meaning of the words used in the Federation Act.

Our Assessment Act, 32 Vict. c. 36, s. 5, O., says: "All municipal, local or direct taxes or rates, etc., shall be levied equally upon the whole ratable property, real and personal, of the municipality or other locality," etc.

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Sec. 28 speaks of income derived from any trade, office, calling, profession or other service whatever, not declared exempt by this Act. The Imperial Income Tax Act, 16 and 17 Vict. c. 84, s. 2, provides that Income Tax shall be payable for or in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom, from any profession, trade, employment or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, or accrue to any person not resident within the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession or vocation exercised in the United Kingdom. This language is far wider and more precise than our Assessment Act. It is commented on in *Attorney-General v. Alexander* (1).

Chief Justice Marshall, in *McCulloch v. Maryland* (2), says: "The people of a State, therefore, give to their Government a right of taxing themselves and their property, and, as the exigencies of Government cannot be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representative to guard them against its abuse. But the means employed by the Government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the Legislature which claim the right to tax them, but by the people of all the States. They are given by all for the benefit of all, and, upon theory, should be subjected to that Government only which belongs to all.

"It may be objected to this definition that the power of taxation is not confined to the people and property of a

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(1) L. R. 10 Ex. 20.

(2) 4 Wheaton, 316, 428.

State. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

“The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States to a Government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

“If we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess and can confer on its Government, we have an intelligible standard applicable to every case to which the power may be applied. . . . .

We are relieved, as we ought to be, from clashing sovereignty, from interfering powers, from a repugnancy between a right in one Government to pull down what there is an acknowledged right in another to build up. We are not driven to the perplexing enquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the Government of the Union, in pursuance

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of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

"We find then, on just theory, a total failure of this original right to tax the means employed by the Government of the Union for the execution of its powers. The right never existed, and the question, whether it has been surrendered, cannot arise." See also 1 Kent Com., 11th ed., sec. 425.

To my judgment, all these remarks on the relative positions of the Federal and State Governments apply with even greater force to our Canadian Constitution. Ontario can never be looked on as a Sovereign State surrendering certain of her rights to the Government of a Federation of which she consents to form a part. Our Province is the creation of the Imperial Parliament, originally under the Act 31 Geo. III.; again, on the union of the Upper and Lower Provinces as "Canada;" and lastly, under the Federation Act. Our present legislative powers have their origin from the latter enactment.

It was suggested that the power of disallowance by the Governor-General of any Provincial law was a sufficient check on any abuse of the taxing power, so as to ensure against any prejudicial impeding or affecting the provision made for Dominion officials. I do not see how the existence of such a power can affect the constitutionality of the enactment.

The officers of the Dominion do not exercise their functions within the bounds of any of the Provinces by the permission of the Local Government. They are there by authority of a higher power.

In the words already cited, the Province has no sovereignty over them or their salaries, as existing by its authority or introduced by its permission.

The Federation Act (sec. 125) declared the "lands

and property" belonging to the Dominion should not be subject to taxation. We may understand the general object to be the prevention of any claim to place a burden on the assets and resources of the general Government. Quite within the spirit of such legislation, though outside its letter, would be the extension of the prohibition to the moneys applied to the remuneration of services for the performance of the necessary duties of that Government.

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The reasoning of the Supreme Court seems to me to be sound, and directly in point on the case before us, and, in my judgment, ought to be adopted by us.

I think the appeal must be allowed.

BURTON, J. A.:—

Among the reasons against the appeal, the point is taken that the plaintiff is not an officer of the Dominion Government; but it was abandoned upon the argument, and it was stated by counsel on both sides that this is in fact a test case, in which both parties are desirous of having the judgment of the Court upon the substantial question in issue. I have assumed, therefore, that the plaintiff is such an officer, and have considered the question in that view.

The case presents itself in two aspects: 1st, as to whether, upon the proper construction of the Assessment Acts of Ontario, the income of the plaintiff derived as a salary from the Dominion Government is declared exempt; and if not, 2nd, whether the Legislature of Ontario has power to impose a tax upon the salary of such an officer, or to confer such a power upon the several municipalities.

In tracing back the Assessment Acts of Ontario, we find that until the passage of the 29 and 30 Vict. c. 53,

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there was no exemption of any of the official salaries of the officers and servants of the several departments of the executive Government and of the two Houses of Parliament; but by the 28rd section of that Act they were declared to be exempt; and such was the state of the law when the B. N. A. Act was passed and Confederation established.

The Ontario Legislature, in its session of 1868-9, continued this exemption, applying it in terms both to the government officials of the Dominion and those at Toronto.

But that Act was varied by the Ontario Statute of 1871, and the Local Legislature have manifested their intention, by the repeal of sub-s. 25 of s. 9, to discontinue the exemption.

It was indeed contended that under sub-s. 12 of s. 9, this salary was exempt, as included under the words "any salary . . . derived by any person from Her Majesty's Imperial treasury, or elsewhere out of this Province." The first and concluding portions of that section have reference to the full or half-pay of Imperial military and naval officers and their personal property when on actual service, and it is quite possible, though by no means free from doubt, that that portion of the section which refers to any pension, salary, gratuity or stipend, must refer to that class of persons deriving them either from the Imperial treasury or from some colonial or foreign Government, and not to a class of persons like the plaintiff, whom the Legislature seemed to think it necessary to exempt by express words, but which exemption they intended to sweep away by the Act of 1871; and this would seem to be borne out by the 13th subsection, which exempts all pensions of \$200 a year payable out of the public moneys of the Dominion of Canada, which would have been already exempt under the 12th

sub-section if the words "elsewhere out of this Province" are to be construed as the plaintiff contends.

We have had occasion in a previous decision to refer to the difficulty of applying the ordinary rules of construction to the present Assessment Acts, but upon the best consideration I have been able to give to the matter, I have individually come to the conclusion that the Legislature of Ontario has manifested its intention to tax these official incomes, and that effect must be given to that intention unless it should be found to be *ultra vires*; and the point really for consideration is their power to do so.

In considering this question we shall derive but little assistance from English decisions, as under their system the question could probably only arise if an attempt were made by a colony to tax the salary of an officer of the Imperial Government, and because the Parliament of England has not yet discovered the propriety of conferring on local or municipal authorities the power to tax incomes or other property which derives no benefit from municipal government or police regulations. Under any well-matured or intelligible system we would expect to find municipal burdens so apportioned that the property partaking to a greater or less extent of the benefits of police protection and local improvements would bear their fair proportion; and one would naturally expect that real and personal property having an actual situs within the municipality, including household furniture and effects, would be selected as fit subjects for taxation; but upon what principle a person deriving an income from property not protected by the municipal authorities should be taxed *upon that income*, it is difficult to discover, and the incongruities and injustice of the system now in force in this Province are brought out in bolder relief when we refer to recent legislation, conceding additional power

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to municipalities of granting moneys in aid of local railways and manufactures, for which a person assessed solely upon income is compelled to contribute, although he is by the same law excluded from the privilege of voting upon the by-law granting such aid, notwithstanding that he may be the largest ratepayer on the assessment roll.

It is merely necessary to state the case to demonstrate its manifest injustice. This is, however, an anomaly with which the Legislature alone can deal. We have nothing to do with the policy or impolicy, the justice or injustice of taxing such a description of property for purely local purposes, but are confined to the consideration of whether the Local Legislature has the power to impose, or authorize a municipal body to impose, a tax upon that description of income which is granted as a salary by the Dominion Government to one of its officials, or whether such an exercise of power is *ultra vires*, and the levy of the tax illegal.

Both the Dominion and the several Provinces of which it is composed derive their legislative powers under what is known as the B. N. A. Act of 1867. A Parliament for the whole Dominion, consisting of the Queen, Senate, and House of Commons, is thereby established; and under the 69th section a Legislature for Ontario, consisting of the Lieutenant-Governor and one House, styled the Legislative Assembly of Ontario, is likewise established.

The powers of these several legislative bodies are defined by the 91st and 92nd sections of that Act. By the former the Queen, with the advice and consent of the Senate and House of Commons, is to make laws for the peace, order and good government of Canada, in relation to all matters *not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces;*

and for greater certainty, but not so as to *restrict* the generality of the foregoing terms, it was declared that the exclusive legislative authority of the Parliament of Canada should extend to all matters coming within certain defined classes of subjects, *inter alia*, "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." And the Act provides that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

By the next section, which in similar terms defines the exclusive powers of the Provincial Legislature, it was provided that the Local Legislature might make laws in relation, *inter alia*—sub-s. 2—to "direct taxation within the Province in order to the raising of a revenue for Provincial purposes;" and—sub-s. 8—to "municipal institutions in the Province;" and—sub-s. 16—"generally all matters of a merely local or private nature in the Province."

If the Provincial Legislature could not, for Provincial purposes, impose a tax of this nature, *a fortiori* they could not delegate such an authority to a municipal body for carrying out the mere purposes of municipal government—such as the paving of streets, police, and other matters that come within the jurisdiction of those bodies.

We are driven then to consider the broad question whether, under our Federal system of government, a Provincial Legislature is prohibited from taxing an officer of the Dominion for his office or its emoluments, the arguments against such power of taxation being that such a tax having the effect of reducing the compensation for the services provided by the Act of the Dominion

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would to that extent conflict with the Act and tend to neutralize its purpose.

The Supreme Court of the United States has held in a long course of well-considered decisions, commencing with *McCulloch v. Maryland* (1), that the States cannot tax the agencies of the general Government, for, as it is urged, if they could, it would be within their power to impose taxation to an extent that might cripple, if not wholly defeat, the operations of the national authorities within their proper sphere of action.

Mr. Justice Morrison is reported to have said, in giving judgment in the Court below, that the principle laid down in that case has been reversed by a subsequent decision in the case of the *National Bank v. The Commonwealth* (2); but with great deference I am unable to agree in the view which he takes of the judgment in that case. The learned Judge who delivered that judgment, referring to the leading case, remarks that the doctrine which exempts the instrumentalities of the general Government from the influence of State taxation, being founded on the implied necessity for the use of such instruments by the Government, such legislation as does not impair the usefulness or capability of such instruments to serve the Government is not within the rule of prohibition; in other words, that the State Legislature might exert their power of taxation generally upon persons and property within their boundaries, but that they could not thereby interfere with any functions of the nation; so far from being in conflict with the leading case, it appears to me to confirm it, drawing a distinction between the power of the State Government over the person and property of the official, and the right to tax the means used by the Government of the Union to execute its powers.

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(1) 4 Wheaton, 316.

(2) 9 Wallace, 353.

A similar question was raised in *Osborne v. The United States Bank* (1).

The State of Ohio had laid a special tax of \$50,000 a year upon a branch of the bank, no doubt for the express purpose of destroying it. But the Court fully affirmed the principles laid down by Marshall, C. J., in *McCulloch v. Maryland* (2), and held the tax invalid.

I also fail to see how the case of *Dobbins v. The Commissioners of Erie County* (3), is distinguishable; still less would I venture to question the soundness of a decision in which so eminent a jurist as Chief Justice Taney, followed the opinion of his illustrious predecessor, Chief Justice Marshall, whatever might be my view of its application to the case under consideration. The learned judge who delivered the opinion used this language at p. 447: "Taxation is a sacred right essential to the existence of government; an incident of sovereignty. The right of legislation is co-extensive with the incident, to attach it upon all persons and property within the jurisdiction of a State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and in the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject by express prohibitions in the Constitution; and the States by such as are necessarily implied when the exercise of the right by a State conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a State acts upon the instruments, emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers."

For the same reasons, although for some time a dif-

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(1) 9 Wheaton, 738.

(2) 4 Wheaton, 316.

(3) 16 Peters, 435.

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ferent opinion prevailed, the National Government cannot tax the agencies of the State Government. The same supreme power which established the departments of the General Government determined that the Local Governments should also exist for their own purposes, and should retain their original powers, except in so far as they were granted to the Government of the United States.

In *Collector v. Day* (1), Nelson, J., at p. 127, says in respect to the "Reserved powers:" "The State is as sovereign and independent as the General Government. And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? . . . In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any Government whose means employed in conducting its operations, if subject to the control of another and distinct Government, can only exist at the mercy of that Government. Of what avail are these means if another power may tax them at discretion?"

The question arose in a somewhat different form in 1862, in the case of *The Bank of Commerce v. The City of New York* (2).

The statute of New York State provided for taxing banks upon the amount of their capital. The bank had a capital of several millions of dollars, and the largest proportion of it was invested in United States securities, which the bank claimed were exempt from taxation. The assessors fixed the taxable property of the bank at the whole value of the capital stock, without regard to the

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(1) 11 Wallace, 113.

(2) 2 Black, 620.

fact of its being chiefly invested in the public debt of the United States, but added that the assessment was not made upon the public debt, but upon the bank capital.

The Court of Appeals of New York held the assessment valid, distinguishing it from *Weston v. The City Council of Charleston* (1); the distinction insisted on being, that in the latter case the tax was laid upon United States stocks "*eo nomine*," while in the New York case the securities were included in the mass of property owned by the corporation, and were taxable with that aggregate. The Supreme Court repudiated that distinction and reversed the decision. It was conceded that the taxing power, so far as it was reserved to the States and used by them within constitutional limits, cannot be controlled or restrained by the national Court, the prudence of its exercise not being a judicial question, but that a State tax on the loans of the General Government is a restriction upon the constitutional power of the United States to borrow money; and if the States had such a right, being in its nature unlimited, it might be so used as to defeat the national power altogether.

Prior to this decision the laws of New York had required that the capital stock of banks should be assessed and taxed at its actual value. Shortly after it, the Legislature of New York changed the language of the statute, and enacted that all banks should be liable to taxation, at a valuation equal to the amount of their stock and their surplus earnings. Under this the bank was assessed and taxed upon such valuation. The Court of Appeal again sustained the action of the assessors, and held that the tax was not imposed upon the bank capital, and as a consequence was not imposed on the national securities in which such capital was invested; the substitution of an intangible valuation instead of the real capi-

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tal was treated as a substantial change. But the Supreme Court, in the bank tax case, swept away these refinements, and re-affirmed the doctrine of *The Bank of Commerce v. New York City* (1).

The case referred to in the Court below, of *Melcher v. The City of Boston* (2), does not conflict with these decisions. The plaintiff there was not an officer of the National Government, but was a clerk in the Post-Office, appointed by the Postmaster, and paid by him from funds at his disposal for the general management of the office. The judge, it is true, seemed to hold different views upon the subject generally from those expressed by the eminent jurists I have referred to, but was careful not to commit himself to any decided opinion, and admitted that he had not investigated the question, as the plaintiff had failed to bring himself within *Dobbins v. The Commissioners of Erie County* (3), he not being an officer of the United States in any such sense as would exempt him from taxation on income.

The reasoning in these cases, apart from the high authority of the distinguished jurists who decided them, is to my mind so convincing as to leave no room for doubt, unless a distinction can be drawn so as to render them inapplicable under our system of government. It is said that the relative positions of the United States and the several States of the Union differ essentially from that of the Dominion and the several Provinces; but granting this, is there any intelligible distinction as regards the question we are now discussing?

In the case of the American Constitution, as appears by the recital in that instrument, *the people of the United States*, in order to form a more perfect Union, etc., ordained and established that Constitution, and declared that it and the laws of the United States, which should

(1) 2 Black, 620.

(2) 9 Metcalf, 73.

(3) 16 Peters, 435.

be made in pursuance thereof, and all treaties made under the authority of the United States, should be the supreme law of the land—that is to say, as has been well expressed, “ It means, that so far as the people of the United States—the nation—have seen fit to delegate a portion of their own inherent powers of legislation and government to their appointed rulers, just so far those appointed rulers are supreme throughout the land in the exercise of those delegated powers. ”

The 9th article of the amendment provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people; and the 10th provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Here then we find the former article recognising the people as the one source of all power, as they could not retain what they were not before possessed of, and the latter speaking of some powers which had not been conferred by the people on its General Government as allotted to the States.

The powers delegated to the Government of the United States, like those granted by the Imperial Legislature exclusively to the Dominion, concern, speaking generally, public functions and duties of a higher and more extensive order than the remaining powers which the people reserved to the States Governments. In other words, the people entrusted to the central authority the powers and functions which were deemed necessary for carrying on the government of the Union, whilst those deemed appropriate for the carrying on the government of the individual States were reserved to the State authorities.

With the exception of the power of declaring war and making treaties, the powers granted to the General Gov-

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ernment of the United States are similar to those granted by the Imperial Legislature to the Dominion—among others, the power of appointing its own officers, and an unlimited power to raise money by any mode or system of taxation.

The States had also originally the power to tax as bodies politic, which power was still retained in all instances, and in all methods, except so far as they are restrained by the National Constitution—that is to say, they are expressly restricted from imposing taxes or duties on exports from any State, duties on imports or exports or tonnage; and although there is no express restriction, there is the implied limitation of imposing taxes on the property of the General Government, or upon the means which that Government has adopted to carry on its public affairs. The principles enunciated in these decisions apply, as it appears to me, with equal, if not greater force, to cases of a similar nature arising under our own Constitution. In the one case the Government of the United States was created, not (as is sometimes inaccurately stated) by the several States, but by the people of the United States—the *nation*, possessed of supreme power—whose creature and agent the Government of the United States is. In the same way the States derive their authority from the same source, the sovereign people; the powers of legislation and administration are derived from them; those granted to the Central Government are, as in our own case, higher and more national than those entrusted to the Local Government, but, as with us, *within their respective limits each is uncontrolled by the other*. We also derive our Constitution from the sovereign power, the Legislature of Great Britain. The powers granted to the Dominion are very similar to those granted by the sovereign power to the Government of the United States. The powers granted exclusively

to the Province are very similar to those reserved to the States, each Government is distinct and separate from the other.

But it is said that there is this important difference from the Federal Constitution of the United States, that the Dominion Government have in their hands a check upon the legislation of the Provinces, in the power of disallowing any statute passed by them, so as to prevent any legislation which tends to obstruct, defeat, or impede the Dominion legislation. No doubt there is this additional check, and in cases where a Provincial Act is supposed to affect the whole Dominion, or to exceed the jurisdiction conferred on Local Legislatures, or even where the jurisdiction is concurrent, but clashes with the legislation of the general Parliament, this power of disallowance has been sometimes, but not invariably, exercised; but whether allowed or not, to the extent that the Provincial Acts transcend the competence of the Provincial Legislature they are void. If I am right in supposing that the Local Legislature had no power to impose this tax, no declaration of exemption was of course necessary, and there was nothing upon the face of the Municipal Act which either called for or would have justified its disallowance. All that can be said is, that the Act does not warrant the tax in question. The exemption which was contained in the former Acts was in itself partial and unjust, relieving officials at Toronto and Ottawa from the tax, but leaving all officers in other places liable to its exaction. If the construction I place on the law be correct, all these officers will be placed on the same footing, all equally relieved, because they are all agents of the Dominion Government, whose salaries neither the Province nor the municipal authorities can interfere with.

And lastly, it is urged that this is a mere fanciful

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ground of objection, and that the tax is in itself so small as not to interfere materially with the salary which the Government has allotted to the plaintiff; but if the power exists at all, it can be exercised to any extent, and in the event of any Province being dissatisfied with the Dominion Government, it would hold in its hands a weapon which it might resort to to harass the Government and enforce its demands.

I am therefore of opinion that the tax was illegally imposed, that the appeal should be allowed, and the rule *nisi* to set aside the verdict discharged with costs.

PATTERSON, J. A. :—

It is unnecessary to notice the pleadings in this case. The parties agree that the sole question to be tried is whether the corporation of the city of Ottawa can legally assess and collect from an officer of the House of Commons of Canada a tax or assessment upon his income, derived and received as set out in the agreed statement of facts; and the material facts are that the plaintiff lives in Ottawa and has his place of business there, and that the income in respect of which he is taxed, is his salary as an officer of the House of Commons. The tax was imposed under the assumed authority of the Ontario Assessment Act, 32 Vict. c. 36, O.

The plaintiff disputes the power of the Provincial Legislature to tax the salary of an officer of the Government of Canada; and he contends that, even if the jurisdiction exists, he is exempt by the terms of the Assessment Act.

The constitutional question which is raised has engaged the attention of four learned judges before coming before us upon this appeal. The present Chief Justice of this Court, by whom the case was tried, held, at *nisi prius*, that the jurisdiction claimed for the Local Legis-

lature did not exist. In the Queen's Bench, the Chief Justice took the same view ; while the majority, consisting of my brother Morrison, who was then a member of that Court, and Mr. Justice Wilson, were of a different opinion.

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The difficulties indicated by this even balance of judicial opinion retain their magnitude as we proceed with the consideration of the subject. They arise not so much from divergent views in the application of principles upon which all are agreed, as from uncertainty as to the principles themselves upon which the solution should rest ; and for this reason they can only be definitely removed by a Court of final resort.

Before referring to the B. N. A. Act, 1867, it may be useful to note the history of the Assessment law, so far as it seems to touch the matter in hand, and to consider its application to this particular case.

The present system of assessment dates from 1850, having been initiated by the Act 18 and 14 Vict. c. 67.

Before that date the property liable to be rated was defined by the Act of 1819, 59 Geo. III., c. 7. It comprised land, dwelling-houses, mills, store-houses, shops, horses, oxen, cows, young horned cattle, and pleasure carriages. The statute fixed arbitrary values for assessment purposes upon the property of different classes within these general divisions.

The Act of 1850, 18 and 14 Vict. c. 67, declared all land and all such personal property as the Act defined, in Upper Canada, liable to taxation, subject to certain specified exemptions. Personal property was defined as including all such goods, chattels, and other property, as were enumerated in Schedule A, and no other. The enumeration in the schedule was confined to horses, neat cattle, carriages, stocks-in-trade, and shares in vessels owned within the municipality. And section 4 of the

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statute provided that "no person deriving income from any trade, calling, office or profession, exceeding the amount of £50 per annum, should be assessed for a less sum, as the amount of his net taxable property, than the amount derived from such income during the year then last past, but such last year's income shall be held to be his net taxable personal property, unless he had other taxable personal property to an equal or greater amount."

This Act did not profess to tax income simply as income. Under it a man having an income of £500 a year from his profession, and owning horses, carriages, or shares in steamers to the value of £500 or upwards, was taxed nothing in respect of his income; but if he had only £400 of other personal property, he was assessed for £500, that is, for his income alone, taking no account of the other property; his income being held to shew the amount of his net taxable personal property.

There may be no difference that will bear examination between this idea of calling income personal property, and taxing income *eo nomine*. In fact, the same statute provided a form for inserting it upon the assessment roll as "amount of taxable incomes." I merely note the facts that at first the tax was not upon *all* income; and that, by the device of calling the last year's income the taxable personal property of the current year, the direct avowal of the imposition of an income tax was avoided.

The Act of 1850 was repealed in 1853 by 16 Vict. c. 182, which amended and consolidated the Assessment laws.

As before, all land and personal property (subject to exemptions) were made liable to taxation; and the Act extended the definition of personal property to include all goods, chattels, shares in incorporated companies, money, notes, accounts and debts at their full value, and

all other property, except land as defined in the Act, and property therein expressly exempted.

It would not be easy to frame a more comprehensive scheme for the taxation of property, even for Imperial purposes, than that embodied in these words; but still they did not go so far as to include income in the definition of property.

The clause respecting the taxation of income was in the same words as in the Act of 1850, leaving the law on that particular subject just as it was. One of the exemptions which originated in this Act I shall have occasion to refer to again, farther on. Sec. 6 enacted that the following property shall be exempt from taxation:—

*“Eighthly—The full or half pay of any one in any of Her Majesty’s naval or military services, or any pension, salary, or other gratuity or stipend derived by any person from Her Majesty’s Imperial Treasury, or elsewhere out of this Province, and the personal property of any such persons in such naval or military services on full pay, or otherwise in actual then present service; nor shall such persons be liable to perform statute labour or to commute for the same.”*

The Act of 1858 took its place in the Consolidated Statutes of Upper Canada of 1859, as chapter 55, without alteration in any of the particulars to which I have alluded, except that the reference to statute labour was omitted; and it continued in force until 1866, when it was repealed, and a new Assessment Act, 29 and 30 Vict. c. 53, was passed.

This Act repeated the provisions I have quoted from the previous Act, with no other change than including income in the definition of personal property—“debts at their full value, *income* and all other property”—and it added to the exemptions, “28. The annual official salaries of the officers and servants of the several depart-

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                   "      ment."  
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                             took place was that of 1866, 29-30 Vict. c. 53.

Up to that time, as I have shewn, the Legislature had never imposed for municipal purposes, or indeed for any purpose, a general income tax. Income was only taken into account when its amount exceeded that of the rate-payer's taxable personal property. If the property was in excess of the income, he was not taxed on income. If the income was the larger amount, the property was not reckoned; but the amount of the last year's income was taken to be the amount of his net taxable personal property; and, whether he had other personal property or not, the salary of a person in the position of the present plaintiff was exempt from taxation.

The Confederation was effected in 1867.

In 1869 the Legislature of Ontario passed the Assessment Act, 32 Vict. c. 36, O. In this Act the definition of personal property given in the Act of 1866, which included "income," was retained; but the taxation of income was put on a new footing. It was not left to depend upon the accident of the non-existence of other property, but was made the subject of specific assessment. The closing provision of sec. 35 is: "Such last year's income, in excess of \$400, shall be held to be his net personal property, unless he has other personal property liable to assessment, in which case such excess and other personal property shall be added together and constitute his personal property liable to assessment." But while incomes in general were thus distinctly made liable to taxation, the salaries of the officers and servants of the several departments of the Executive Government and of the Senate and House of Commons, resident at

the seat of government at Ottawa, and of the officers and servants of the several departments of the Government of Ontario, resident at Toronto, were (by sec. 9, sub-s. 25) exempted.

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In this state of the law the present contest could not have arisen. Patterson, J. A.

It has become possible, by reason of the repeal of sub-s. 25 in 1871, by 34 Vict. c. 28, O.

The defendants urge that the effect of this repeal is to bring the salary of the plaintiff distinctly under the operation of sec. 35, and to make it liable to taxation.

The plaintiff, while relying upon the constitutional question, also contends that he is still exempt by force of sub-s. 12 of s. 9, 32 Vict. c. 36, O. This sub-sec. resembles the sub-s. 8, which I have already quoted from the Act of 1853, but extends the exemption to the houses and premises occupied by certain persons whom it specifies. Its language is: "12. The houses and premises occupied by any of the officers, non-commissioned officers and privates of Her Majesty's regular army or navy in actual service, *and the full or half pay of any one in any one or either of such services; and any pension, salary, gratuity or stipend derived by any person from Her Majesty's Imperial treasury, or elsewhere out of this Province; and the personal property of any person in such naval or military services on full pay, or otherwise in actual service.*" The plaintiff contends that his salary is an income derived from an extra Provincial source, within the meaning of the words *salary derived out of this Province*.

Reading the sub-sec. by itself, it does, in my opinion, cover the case of the plaintiff. It deals separately with the three subjects of taxation—lands, income, and personal property. As to two of these, viz., their dwelling houses and their personal property, it exempts such



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naval and military men as may happen to be on duty in the municipality, but no other persons. The first part and the last part of the clause, omitting the middle part which I have put in italics, deal with these two exemptions. The other branch is not confined to soldiers and sailors. It is covered by the words I have italicised.

I perceive no principle of construction which requires the words "elsewhere out of this Province" to be limited in their signification to the classes provided for in the first branch and the last branch of the clause; and I imagine I can see good reason for struggling against so construing it, even if the grammatical indications of such a meaning were stronger than they are. It is only this clause, so far as I can discover, which relieves such a person as the Consul of a foreign state from being called upon to contribute a percentage of his official salary to the funds of the local municipality where he happens to live (assuming for the moment the power to tax the incomes which residents derive from beyond the Provincial limits); and I do not know why he has not at least as good a claim to exemption as a half-pay officer who, for his own convenience or pleasure, chooses to live in the same town.

We should be obliged, in my opinion, in giving to the language of the clause its plain grammatical meaning, to read the exemption as embracing the salary paid to a Consul by the state he represents; or coming from without the Province to any recipient who happens to live here.

It is argued, however, that the intention is apparent from other parts of the statute not to include in this particular exemption salaries paid by the Government of Canada; and some specific exemptions are referred to, which, it is said, would have been unnecessary except on the understanding that sub-section 12 did not treat the

Central Government as being "elsewhere out of this Province." Thus sub-section 11 exempts the "personal property and official income of the Governor-General, and the official income of the Lieutenant-Governor of the Province"—the salaries of both these officers being paid by the Central Government; sub-section 18 exempts all pensions of \$200 a year and under, payable out of the public moneys of the Dominion of Canada, or of the Province; and sub-section 25 exempted the salaries of officials both of the Central and Local Governments who were resident at the seat of government. It is further urged that by repealing sub-section 25, the Legislature asserted the right and intention to tax the salaries of Dominion officials. It cannot be denied that these are objections of great weight against the construction for which the plaintiff contends; and they are further enforced by the fact that the language in question is merely repeated from the statutes of earlier date than Confederation. On the other hand, there are not wanting considerations which weaken their force. It happens that each of the sub-sections 18 and 25 deals not only with incomes derived from the Dominion Government, but also with those paid by the Province. In expressly exempting those of the latter class, it may well have been that *e majori cautela*, and to guard against the inference that one being expressly exempted the other was meant to be liable, both were included in the express exemption. It is accordingly no exceptional distinction to this statute to say that we do not find it framed with so much precision and care as to make it always safe to deduce the necessity for a particular provision from the fact that we find it there. For proof of this we need not go beyond this ninth section. Thus, the express exemption by sub-section 1, of all property vested in Her Majesty, or vested in any public body or body corporate, officer, or person in

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trust for Her Majesty, or for the public uses of the Province, involves the assumption that there was power to tax property which section 125 of the B. N. A. Act declares shall not be liable to taxation. Sub-section 18 professed to exempt all real and personal property owned out of the Province—a meaningless provision if it referred to property which was not in the Province; and one which contradicted the whole scheme of the Assessment law, if the idea was to exempt property in the Province when its owner lived elsewhere. This inadvertency was corrected by a later statute. Then we have sub-section 21, exempting the annual income of any person, provided the same does not exceed \$400—a correct enough provision, but unnecessary; because section 85, under which income is assessed, makes only the excess over \$400 taxable.

Provisions like some of these may, though not strictly necessary, be more practically useful than a more scientific arrangement of the enactments. My only object in criticising them is, to point out that we cannot disregard the characteristic structure of the Act, when we are asked to reason from the existence of sub-sections 13 and 25 that the Legislature could not have intended the language of sub-section 12 to bear what would otherwise be its plain signification—these two sub-sections not being inconsistent with No. 12, but only covering again a part of the same ground. The influence of sub-section 11 upon the construction of sub-section 12 is certainly no greater than that of 13 and 25. Passing over the circumstance that it is a continuation of the provision which, from 1853 downwards, had applied to the Governor or Lieutenant-Governor of the Province, which may have no significance, because during all that time the salary was paid by the legislating Province; and merely noticing that, placed as it is immediately before sub-section 12, it may properly be read with it as one clause, and so

read there would be no room for the argument now founded upon it; we should hesitate to infer that the Legislature considered an express exemption necessary to prevent the corporations of Ottawa and Toronto insisting upon a percentage of the sums appropriated under sections 60 and 105 of the B. N. A. Act, to the representative of the Crown and his lieutenant, because by the same rule we should have to regard sub-section 1 as shewing that the Legislature supposed it had power to tax public property.

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The argument from the repeal of sub-sec. 25 is, that the Legislature in 1871 indicated by that measure the intention that thenceforward the incomes mentioned in that clause should be taxed; that, in fact, the bare repeal was equivalent to an affirmative enactment that they should no longer be exempt. Doubtless this would have been its effect, if the exemption depended upon this clause, as it did in the case of the Ontario salaries. It was a clause which, as I have already pointed out, dealt with Provincial as well as Dominion salaries; and it contained another feature which may have excited opposition to its continuance, by creating a distinction of an invidious character between those officials who lived at the seats of government, and their fellows who were scattered through the Province.

I have given my opinion of the effect of this clause and No. 13 together. I do not see that if its existence failed to qualify the operation of sub-sec. 12, that result can have been accomplished by its repeal.

I cannot say I am much pressed by the consideration that the language of sub-sec. 12 was framed before the Dominion was constituted. I am rather disposed to regard the clause as shewing a perception of the unsoundness of the principle on which incomes are made liable to local taxation.

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"It is an important principle"—I quote from J. S. Mill—"that taxes imposed by a local authority, being less amenable to publicity and discussion than the acts of the Government, should always be special; laid on for some definite service; and not exceeding the expense actually incurred in rendering the service. Thus limited, it is desirable, whenever practicable, that the burden should fall on those to whom the service is rendered." In our system of municipal institutions the principle of imposing special taxes for special and definite services, though occasionally resorted to, as in the case of the local improvements provided for in ss. 464 and 469 of the Municipal Act of 1873, does not form the general rule; and, considering the scope and variety of the functions and powers of our municipal corporations, it is probably a principle which could not in practice be conveniently extended to the revenue raised for general purposes. But the rule that the burden should fall on those who benefit by the outlay nevertheless holds good; and should apply to exclude the salaries of officials like this plaintiff, if not incomes in general, from contributing to the local expenditure.

It seems not unfair to assume that whatever arguments may have, in the legislative mind, prevailed over the very cogent ones adducible against the taxation of any income for local purposes, the incomes derived from extra Provincial sources were recognised as proper subjects for exemption; and to treat sub-sec. 12 as at least embodying that principle, and therefore not to be restricted in its application to the particular instances which we may conjecture were in the mind of the draughtsman who first penned the clause, or of the Members of Parliament who originally voted for it.

The defendants do not gain much assistance from the direct language of the affirmative provisions of the Act.

Section 8 declares that "all municipal, local or direct taxes or rates shall, when no other express provision has been made in this respect, be levied equally upon the whole ratable property, real and personal, *of the municipality or other locality*, according to the assessed value of such property, and not upon any one or more kinds of property in particular, or in different proportions." And by sec. 9, "All land and personal property *in the Province of Ontario* shall be liable to taxation, subject to the following exemptions." There can be no pretence that these words of themselves convey any suggestion of taxing incomes. We have personal property defined as including *income*; but that word, without more, cannot be read as declaring that such an income as the one now in discussion is personal property in the Province, much less property of the locality. Turning to sec. 85, we find that "No person deriving an income exceeding four hundred dollars per annum from any trade, calling, office, profession or other source whatsoever, not declared exempt by this Act, shall be assessed for a less sum as the amount of his net personal property than the amount of such income during the year then last past, in excess of the said sum of four hundred dollars; but," etc. Reading this by the light of ss. 8 and 9, the natural impulse is to read "No person deriving an income *in this Province*, exceeding," etc. The words are not "having" or "being in receipt of" an income, but *deriving*; the same word used in sub-sec. 12, which exempts incomes *derived* from extra Provincial sources. The idea that extra Provincial incomes are covered by the language of sec. 85, comes rather from the exempting clauses than from those relied on as authorizing the tax.

The defendants, who assume to impose a burden upon the plaintiff, have to shew us not merely that it is possible to interpret the statute in the sense for which they con-

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tend, but that their reading of it is the natural and proper rendering of its language; or, if the language admits of two constructions, they must shew that that which supports their case is indicated as correct by its accordance with sound principles, or the clear intention of the Legislature.

I am not satisfied that this has been done; and I therefore think that if the case had to be decided on this point, the proper conclusion would be, that they have failed to establish their plea of justification.

The more important question is that of the jurisdiction of the Legislature under the effect of the B. N. A. Act, 1867, which is the charter of our Constitution.

It has been urged before us, as it was in the Courts below, that the Constitution of the United States of America is so far analogous to ours that the principles settled by the Courts and recognised in practice as governing similar questions with them, may safely be adopted as furnishing the rule by which we should be guided. In one respect the Constitutions are similar. There are, in each case, the Central Government and the Local Government, each with its powers more or less distinctly defined and limited. How much farther the analogy extends it is not at present important to inquire, as these are the points of resemblance which affect the matter before us. The importance of having the line which separates the jurisdiction of the Central Government from that of the Local distinctly marked by express stipulation or recognised principles is in each case sufficiently obvious.

The B. N. A. Act is the source to which we must appeal for a declaration of the powers of each of our Governments, central and local.

Among the subjects enumerated in sec. 92, as those in relation to which the Provincial Legislature may exclu-

sively make laws, is "2. Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes." There is also, "8. Municipal institutions in the Province."

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It does not strike me that any argument of much force in the present contest can be based upon the latter article, or that it is necessary to resort to it as a basis for argument. If no express power to tax had been given, it is probable the power would, nevertheless, exist as incident to the working of municipal institutions; but, as the express power is given, we are not driven to seek for it by implication.

In my judgment, it is in the second article alone we find the foundation and the restriction of the general power of taxation conferred upon the Provincial Legislatures. The general power is to raise a revenue by direct taxation. The restriction confines such taxation within the Province. Special powers, such as the power of indirect taxation by means of licenses under the ninth article, we need not notice at present.

Taxation within the Province must mean the taxation of property within the Province, or a poll tax on persons within the Province. The tax now in question is not a poll tax, and the Legislature of Ontario has never professed to tax property out of the Province.

I have already quoted the words of section 9 of the Assessment Act, which declares that all land and personal property *in the Province of Ontario* shall be liable to taxation; and the words of section 8, which put forward the principle of imposing all municipal taxes equally upon the whole ratable property, real and personal, *of the municipality*. It is true that, by a somewhat recent extension of the definition of property, that word, as now used in the Assessment Act, includes income; and it may be that by expressly exempting extra Provincial



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incomes enjoyed by residents of our Province, it is shewn that the Legislature treated those incomes as being property within the Province; though, for reasons already given, it may be that we should not draw that inference from the insertion of the exempting clause; and it is true that municipal bodies have not always been careful to inquire whether the personal property they assumed to tax was in truth property in the Province; as in the case of stock in banks, whose chief place of business was not in the Province, which was in question in *Nickle v. Douglas* (1). But, having regard to the restriction of the right of direct taxation to the Province by the terms of the B. N. A. Act, it is obvious that unless the income in question is in truth *property within the Province*, the imposition of any tax upon it is *ultra vires* of the Provincial Legislature; and another reason is furnished for reading the exempting clauses as I have before suggested, and for classing sub-sec. 12 in its relation to incomes derived from extra Provincial sources with the first sub-sec. in its relation to public property, as declaring exempt what there was no power to tax.

In construing the words of the second article of sec. 92 of the B. N. A. Act, "Direct taxation within the Province," as confining the power to tax property to property within the Province, and inquiring if these incomes are property within the Province, we have necessarily to disregard the definition of property by the Ontario Assessment Act, so far as the status of the income as being property, or as being within the Province, depends on that definition. Both the learned judges who formed the majority of the Court in giving the judgment now in review, refer to these incomes as being property within the Province, either in their true character or by force of the Assessment Act. That position does not seem to

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(1) 35 U. C. Q. B. 126; 37 U. C. Q. B. 51.

have been controverted; and the question whether a salary paid from abroad to an official living here, or an income such as dividends on stock, like that which in *Nickle v. Douglas* was held not to be property in the Province, can in any proper sense be called property in the Province, has not been argued before us. I express no decided opinion upon it; and, as the present decision proceeds upon other grounds, it is not necessary to do so. I notice the question principally for the purpose of saying that it still remains open.

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The eighth article of section 91 of the B. N. A. Act enumerates, as one of the classes of subjects to which the exclusive legislative authority of the Parliament of Canada extends, "The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada."

The defendants in effect contend that the Assessment law of Ontario entitles them to require from the plaintiff a share of his salary so fixed and provided for; and that the power of direct taxation within the Province enables the Provincial Legislature to confer that right upon the city corporation.

The claim is resisted upon the same grounds on which the decisions have proceeded in the Supreme Court of the United States, under which the principle has been established that the State Legislatures cannot, by the imposition of taxes or other burdens, impair or do what tends to impair the efficiency of the instruments employed by the Central Government.

The leading case of *McCulloch v. Maryland* (1), and the cases which have followed that most important decision, have been referred to and commented on so fully in the judgments delivered in the Courts below, and by my brother Burton in the judgment he has

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(1) 4 Wheaton, 316.

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just delivered, that I do not attempt any review of them.

The principle which they establish, and which is recognised as the settled law of the United States, as I gather from the text-writers upon the subject, would pronounce a statute passed by a State Legislature, and having the effect which the defendants seek to attribute to our Assessment laws, unconstitutional and void; and this, not by the force of any positive provisions of their written Constitutions, but upon reasoning which appears to me to be entirely applicable to our Constitution, and the force of which is increased by the effect of the eighth article of section 91.

It is argued that the reasons which had force in the Supreme Court, when dealing with the Constitution of the United States, are not applicable with us, or have less weight. Thus, when it is said, as in the leading case, at p. 481, "that the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied," the answer to the argument based on those propositions, as it is summarized by Chief Justice Marshall, is very much the same as that by which a similar argument is met before us. He puts it thus: "But all inconsistencies are to be reconciled by the magic of the word 'confidence.' Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government."

The appeal to confidence which the Supreme Court

held to be ineffectual, does not possess, in my judgment, any greater weight when advanced in our tribunals.

There is no security that, in the exercise of a power which is capable of being used to the detriment or embarrassment of the Central Government, the Provincial Legislature will always be guided by a judicious regard for the harmonious working of all the departments of the Constitution. What motive may be found sufficiently powerful to lead to antagonistic legislation, or whether any such motive may arise, or whether, from caprice, or from crude theories of political economy, or from any cause whatever, the power now in dispute may be exercised in a vexatious manner, must be matter of speculation.

The very Assessment law we are discussing affords at least one example of departure from a professed principle, under the influence of a motive of sufficient force. Equality of taxation of all property of the municipality, real and personal, is announced as the fundamental principle of the law. Every statute from 1850 downwards has contained the same announcement. It was discovered, however, and was one consequence of taxing personal assets for local purposes, that it was impolitic to treat investments in bank stock as the same money, if invested in real property, would be treated; and accordingly, by 37 Vict. c. 19, s. 3, O., the shares held by any person in the capital stock of any incorporated or chartered bank doing business in this Province, were exempted from assessment for municipal or other local rates or taxes, and the dividends only were made assessable as income. I do not doubt or question the wisdom or the expediency of this change in the law. I refer to it merely as illustrating the instability of professed principles of legislation, even on the subject of taxation, in the presence of a powerful disturbing

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influence. Who can say that a further discrimination in favour of other property as against the incomes of Dominion officials, or an avowed abandonment of the equality principle, is impossible, for some reason which, in a time of political excitement or discontent, may be thought sufficient to warrant such a measure?

I have had an opportunity of seeing some of the judgments lately delivered in the Supreme Court at Ottawa, in *Regina v. Severn* (1), and I observe that more than one of the learned judges, in deciding against the Province the question of the right to require a brewer to obtain and pay for a license to sell his beer for consumption in the Province, for which the Provincial Government had contended under the ninth article of sec. 92—"Shop, saloon, tavern, auctioneer, and other licenses"—gave weight, as a reason for the construction which they placed upon the words "other licenses," to considerations based upon the impolicy of conferring upon the Local Legislature a power which might be made use of to impede the operations or thwart the policy of the Central Government.

To hold the taxation of the incomes of Dominion officials *ultra vires* of the Provincial Legislature by no means involves the exemption of those persons from bearing their share of the burdens which ought to be borne by all persons associated within the precincts of a municipality.

The maxim of Dr. Adam Smith, which has met with such universal acceptance, that "the subjects of a State ought to contribute to the support of the Government in proportion to the revenue which they respectively enjoy under the protection of the State," has but little direct application to local municipalities; but even substituting Municipality for State, the rule would seem to be satisfied by a tax on the real property one holds, and perhaps on

certain kinds of tangible personal property which may be supposed to benefit by the municipal expenditure. These taxes, of course, every resident or property owner must pay, just as he must pay his rent to his landlord for the house he lives in, from whatever source his money comes. It is so far a matter of *quid pro quo*. But the principle fails when it is applied to the salary. This can scarcely be better illustrated than by reference to the class of officials which includes the plaintiff. By the present Assessment law, under an amendment made in 1874 (37 Vict. c. 19, s. 6, O.), a person holding an appointment at an annual salary, who performs the duties of his office in a municipality in which he does not reside, is assessed for his salary at the place where he performs his duties, and not at his place of residence.

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The city of Ottawa is bounded in one direction by the River Ottawa, and in another by the Rideau. Across the Ottawa is the city of Hull, in the Province of Quebec. Across the Rideau is the village of New Edinburgh, in the Province of Ontario. Many of the officials, whose duties are performed in the parliamentary and departmental offices in the city of Ottawa, reside in Hull and in New Edinburgh.

If municipal taxation is supposed to have any relation to the idea of payment on the one side for benefits conferred on the other, I do not understand why the city of Ottawa can justly claim a percentage of the salaries of these non-resident Government officials. The words of J. S. Mill, used in reference to one phase of the income tax, which he describes as having the merit of being a very easy form of plunder, would seem not inappropriate to such an exaction.

The injustice, or what strikes me as injustice, becomes distinctly apparent in the cases I have just been speak-

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ing of. It is exactly of the same character when the official happens to live in the city of Ottawa.

The objects and purposes of the outlay of our municipal corporations, as well as their functions and powers, certainly embrace many matters beyond the range of local police regulations; but, extensive and varied as they are, I know of nothing in their character which brings the *quid pro quo* doctrine, however liberally interpreted, to the support of the right now in dispute. To take an instance: a substantial proportion of the expenditure of most of our towns and cities, as well as of many rural municipalities, is incurred by the bonuses granted to railway companies or other enterprises, from which the municipality, in fact or in anticipation, derives material benefit. By whom are these benefits enjoyed? It would be out of place to discuss the policy of incurring onerous debts for the objects alluded to; but it is apposite to our present purpose to bear in mind that the practice is supported by the argument that property will increase in value, and business will be stimulated; and these predictions are often verified. Those who have building lots to sell find more purchasers and get better prices; and those who are engaged in trade find their account in the larger number of customers and the brisker demand; and the facility for moving agricultural produce, while it brings trade to the city, directly adds to the productive value of the farm. The man who stands outside of all this prosperity is the official working for his salary. In respect of his office and of his salary he derives no benefit. If affected at all, it is more likely to be in the way of harder work and higher rent, yet, though not of the class who gain, he is to be in the class who pay.

We are, therefore, in the absence of other foundation for the defendants' claim, referred back to the sovereignty of the Provincial Legislature over property and people

within the range of its jurisdiction; to the argument that it is the legislative mandate; and to the question, is that mandate *intra vires*?

In the plaintiff's view, the position is this:—For the discharge of my duties, and to enable me suitably to maintain myself and those dependent on me, the Parliament of Canada has fixed my salary at \$1500. The defendants, under the assumed authority of the Provincial Legislature, declare that I shall not have \$1500 for those purposes, but that I shall share it with them.

After the best consideration I have been able to give to the case, and with the assistance of the able arguments to which I have listened, as well as the perusal of the judgments delivered at *nisi prius* and in the Queen's Bench, I am unable to find any reason satisfactory to my mind for refusing to apply to this case the principles of the United States decisions.

I think those principles, if properly applied in the circumstances of the cases in which the decisions were given, have an *a fortiori* application in a case like the present, which does not, like several of the American cases, arise in relation to the imposition of a tax for the purposes of the State or Provincial revenue, to which the tax itself would be admittedly appropriate, but in reference to the execution by a local municipality of a power founded, to my apprehension, on a questionable principle.

Acting therefore upon the authority of the eminent American jurists which has settled the question in the neighbouring republic, I hold that the imposition of the tax upon the plaintiff in respect of his salary was a matter which the Provincial Legislature could not authorize without exceeding the authority conferred by the B. N. A. Act. I doubt if, in any proper sense, the plaintiff's salary can be called property within the Province, and am therefore inclined to the opinion that it is not reached by

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the power of direct taxation *within the Province* under the second article of sec. 92, and that we have not only the prohibition deducible from the ninth article of sec. 91, but a failure of original or *a priori* authority; and I further hold, though with distrust of my correctness, that upon the proper construction of the Assessment Act the exemption of salaries like that of the plaintiff has been recognised, and that the transgression of the Provincial jurisdiction exists in the action of the defendants only, and not in the true effect of the statute under which they assumed to act.

I therefore agree that this appeal be allowed, with costs.

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JUDGMENTS IN QUEEN'S BENCH.

[*Reported 40 U. C. Q. B. 478.*]

HARRISON, C. J.:—

The only question argued before us was, whether the official salary of the plaintiff, an officer of the House of Commons of the Dominion of Canada, is exempt from municipal taxation, and that question must be decided on the proper interpretation to be placed on the B. N. A. Act, 1867.

When that Act became the supreme law of the Provinces, then, for the first time united, the annual official salaries of the officers and servants of the several departments of the Executive Government and of the two Houses of Parliament, resident at the seat of Government, were, in the Province of Ontario, by express legislation, exempt from municipal taxation: 29 and 30 Vict. c. 53, s. 9, sub-s. 23.

A similar exemption was declared in the Ontario Assessment Act subsequently passed: 32 Vict. c. 36, s. 9, sub-s. 25; but in 1871 the Legislature of Ontario assumed to repeal the exemption: 34 Vict. c. 28, s. 1, O.

When the question is as to the interpretation of a statute which extends equally to several Provinces, unless it be made to appear that the law on the point under investigation was the same in each Province before and at the time of the passing of the statute, no reliable argument is furnished for its interpretation.

We are not informed as to the law of exemptions in the several Provinces of Nova Scotia and New Brunswick at the time of the passing of the Act, and so must adjudicate on the question now before us without light, if any, in that respect from either of these Provinces.

The B. N. A. Act, which is now our written Constitution, has, like the Constitution of the United States, federally united several communities, before the union having separate Governments and separate Parliaments, ruling and legislating independently of each other, and without reference to each other's interests.

In each Constitution (that of the United States and ours) we see traced in strong characters the separate functions of the executive, the Legislature, and the judiciary departments of government; and provision is made in our Constitution for the independent exercise of the executive and legislative functions, not only by the central authority, but by the authorities of each Province.

Neither Constitution attempts to make provision for all exigencies that may arise in the exercise of these functions.

In considering the Constitution of the United States, the eminent jurist, Chief Justice Marshall, felicitously said: "A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves:" *McCulloch v. The State of Maryland* (1).

In our present enquiry we are alone concerned with the legislative powers conferred on the Parliament of the Dominion of Canada, and the Parliaments of the several Provinces.

These are to be found, so far as expressed, in sections 91 and 92 of the B. N. A. Act.

The former section, 91, confers on the Parliament of Canada power to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces.

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The latter section, 92, assigns certain classes of subjects described exclusively to the Legislatures of the Provinces.

The inference which I draw from the reading of these two sections is, that unless a particular legislative power be found clearly to have been conferred on the Provincial Legislatures by sec. 92, it remains as an unenumerated power with the Legislature of the Dominion, but that where it can be said without doubt to have been conferred on the Provincial Legislatures the action of those bodies within the sphere of their jurisdiction, and subject only to the power of disallowance to which I shall presently refer, is supreme. See *Re Goodhue* (1); *L'Union St. Jacques de Montreal v. Belisle* (2); *Dow et al. v. Black* (3).

In this respect there is a difference between our Constitution and that of the United States, for by the tenth amendment of the Constitution of the United States it is provided that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Where, under our Constitution, a Bill passed by the Houses of Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to the provisions of the Act and to Her Majesty's instructions, either that he assents thereto in the Queen's name, or that he withholds the assent, or that he reserves the Bill for the signification of Her Majesty's pleasure: sec. 55.

Where the Governor-General assents to a Bill in the Queen's name, he shall, by the first convenient opportunity, send an authentic copy of the Act to one of her Majesty's principal Secretaries of State; and if the Queen in Council, within two years after the receipt thereof by the Secretary of State, thinks fit to disallow the Act, such disallowance (with a certificate of the Secretary of State of the day on which the Act was received by him) being signified by the Governor-General by speech or message to each of the Houses of Parliament, or by proclamation, shall annul the Act from and after the day of such signification: sec. 56.

The provisions of the Act as to the assent to Bills, the disallowance of Acts, and the signification of pleasure on Bills reserved, are made to extend and apply to the Legislatures of the several Prov-

(1) 19 Grant, 366; *ante*, p. 560. (2) L. R. 6 P. C. 31; *ante*, p. 63.

(3) *Ib.* 272; *ante*, p. 95.

inces, as if those provisions were re-enacted and made applicable in terms to the respective Provinces and the Legislatures thereof, with the substitution of the Lieutenant-Governor of the Province for the Governor-General, of the Governor-General for the Queen and for a Secretary of State, of one year for two years, and of the Province for the Dominion of Canada : sec. 90.

The effect as regards Bills passed by the Provincial Legislatures, I take to be as follows :

1. The Lieutenant-Governor of the Province, on presentation of a Bill for his assent, shall declare according to his discretion, but subject to the provisions of the Act, either that he assents thereto in the Queen's name, or that he withholds the Queen's assent, or that he reserves the Bill for the signification of the Governor-General's pleasure.

2. Where he assents to a Bill, he must, by the first convenient opportunity, send an authentic copy of the Act to the Governor-General, and if the Governor-General in Council, within one year after receipt thereof, thinks fit to disallow the Act, such disallowance being signified by the Lieutenant-Governor by speech or message to the Provincial Parliament, shall annul the Act from and after the day of such signification.

The power of the Governor-General in Council to disallow a Provincial Act is as absolute as the power of the Queen to disallow a Dominion Act, and is in each case to be the result of the exercise of a sound discretion, for which exercise of discretion the Executive Council for the time being is in either case to be responsible as for other acts of executive administration.

It is not to be expected that the Governor-General in Council will be so far able to examine all Acts passed by the Provincial Legislature as to foresee all possible constitutional difficulties that may arise on their construction, and therefore an omission to disallow is not to be deemed in any manner as making valid an Act, or a part of an Act, which is essentially void as being against the Constitution : see *Regina v. Wood* (1).

While the Act confers on the Parliament of Canada power to make laws as to the fixing and providing for the salaries and allowances of civil and other officers of the Government of Canada (sub-sec. 8 of sec. 91), it confers on the Parliaments of the Provinces the power to make laws as to municipal institutions, as to property and civil

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(1) 5 E. & B. 49, 55.

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rights, and generally as to all matters of a merely local or private nature in the Provinces : sub-ss. 8, 13, and 16 of sec. 92.

The latter powers are subject to the declaration in sec. 125, that "no lands or property belonging to Canada or to any Province shall be liable to taxation."

Power is, by sec. 131, given to the Governor-General in Council, until the Parliament of Canada otherwise provides, from time to time, to appoint such officers as deemed necessary or proper for the effectual execution of the Act ; and by sec. 130 it is provided that, until the Parliament of Canada otherwise provides, all officers of the several Provinces having duties to discharge in relation to matters other than those coming within the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces, shall be "officers of Canada," and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities and penalties, as if the union had not been made.

An office, says Marshall, C. J., is a public charge or employment, and he who performs the duties of the office is an officer. If employed on the part of the United States, he is an officer of the United States : *United States v. Maurice* (1).

Although the plaintiff was not appointed by the Governor-General of Canada, but by the House of Commons of Canada, of which it is admitted he is an officer, he is, I think, for the purpose of the question before us, to be deemed as much an officer of Canada and of the Government of Canada as if appointed by the Governor-General in Council.

The same word, owing to the poverty of our language, is often used in different places to express different ideas. The word "government" may, in a general sense, be taken to express the ruling powers of a country, including legislative and executive, or, in a more limited sense, only the chief executive officers to whose administration the executive duties of government are especially delegated.

In the former sense, Parliament or the Legislature is as much a department of Government as the executive, and it is in this sense I think the plaintiff should be held an officer of the Government of Canada, although not appointed by the Executive Government of Canada.

Every argument which can be urged in favour of the exemption from taxation of the salaries of officers appointed by the Executive

Government is as applicable to an officer appointed by either branch of the Legislature of the Dominion of Canada as to officers appointed by the Governor in Council.

The great question therefore is, whether there is such an exemption as claimed on the part of the officers of Canada, whether appointed by the legislative or executive departments of the General Government.

In the determination of this question I propose, so far as necessary, to refer only to the decisions of the Supreme Court of the United States, and not to any of the decisions of State Courts in conflict with the decisions of the Supreme Court.

It is not pretended that on the face of the B. N. A. Act there is in words any exemption from "municipal taxation" of the salaries of such officers, but the argument is, that the exemption is as necessarily intended and as effectual as if expressed in words. The principal argument against the exemption is, that the Imperial Legislature having, in sec. 125, provided for certain exemptions, none others should be inferred, according to the maxim "*expressio unius est exclusio alterius*." But this maxim, although general, is by no means of universal application: see per Lord Campbell, in *Saunders v. Evans et al.* (1).

The sages of the law (according to Plowden) have ever been guided in the construction of statutes by the intention of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion: *Plowden*, 205 b.

By sub-sec. 2 of sec. 10 of the Constitution of the United States, it is provided that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," etc., and from this it was argued that, with the exception stated, any State had power to lay on taxes not being imposts or duties on imports or exports on any person or property within its territorial jurisdiction; but in no case has the Supreme Court of the United States ever given effect to this argument.

The leading case on the point is *McCulloch v. The State of Maryland* (2), mentioned in the judgment of Mr. Justice Moss. In that case it was held that a law of the State of Maryland imposing a tax on the operations of the Bank of the United States was unconstitutional.

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(1) 8 H. L. Cas. 721, 729.

(2) 4 Wheaton, 316.

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In delivering judgment Chief Justice Marshall said, at p. 425 :  
"That the power of taxation is one of vital importance ; that it is retained by the States ; that it is not abridged by the grant of a similar power to the government of the Union ; that it is to be concurrently exercised by the two governments, are truths which have never been denied. But such is the paramount character of the Constitution, that its capacity to withdraw any subject from the action of even this power is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a State from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain, as it certainly may restrain, a State from such *other* exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union."

In a subsequent part of the same judgment, at p. 432, the same learned and distinguished judge said : "If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail ; they may tax the mint ; they may tax patent rights ; they may tax the papers of the custom house ; they may tax judicial process ; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States."

The result, as expressed at p. 436, was, that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." But it was said that this "does not extend to a tax paid by the real property of the bank in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution (the United States Bank) in common with other property of the same description throughout the State."

The tax was held to be unconstitutional, because on the franchise of the bank, and so on an *instrument employed by the Government of the Union* to carry its powers into execution.

It is reported that William Pinckney said of this celebrated

decision, that in it he saw a pledge of the immortality of the Union : Pomeroy's Constitutional Law, 189.

The Supreme Court a few years afterwards, although a revision of the case was requested, deliberately affirmed it : *Osborn v. The Bank of the United States* (1).

The views expressed in the latter case were afterwards affirmed in *Brown v. The State of Maryland* (2).

It was for some time a question whether a tax on stock of the United States came within the rule laid down in *McCulloch v. The State of Maryland*, or within the exceptions noted at the end of that decision. And notwithstanding the argument that great injustice was done to others by exempting men who were living on the interest of their money from the payment of taxes, thereby establishing a privileged class of public creditors, who, although living under the protection of the Government, are exempted from bearing any of its burdens, the majority of the judges of the Supreme Court, including Chief Justice Marshall, in *Weston v. The City of Charleston* (3), decided that "a tax on stock of the United States, held by an individual citizen of a State, is a tax on the power to borrow money on the credit of the United States, and cannot be levied by or under the authority of a State consistently with the Constitution."

Chief Justice Marshall, in delivering judgment in the last case, said, at p. 468 : "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

A State tax imposed on the State bonds or other securities of the United States was for similar reasons held unconstitutional : *Bank of Commerce v. New York City* (4). But the stock of State banks are under certain limitations liable to taxation : See *The Providence Bank v. Billings* (5) ; *Van Allen v. The Assessors* (6) ; *People v. The Commissioners* (7) ; *Society for Savings v. Coite* (8) ; *Provident Institution v. Massachusetts* (9).

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(1) 9 Wheaton, 738, 859, 860.

(2) 12 Wheaton, 419, 446.

(3) 2 Peters, 449.

(4) 2 Black, 620.

(5) 4 Peters, 514.

(6) 3 Wallace, 573.

(7) 4 Wallace, 244.

(8) 6 Wallace, 594.

(9) *Ib.* 611.



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The case, however, which on the facts most resembles the case before us, is *Dobbins v. The Commissioners of Erie County* (1). In that case the Supreme Court of the United States held that a State had no power to tax an officer of the United States for his office or its emoluments. It was said to be the only instance of a tax being rated in the State of Pennsylvania upon the salary of an officer of the United States. The officer was in command of the revenue cutter *Erie*, on the Erie station. He had been for several years resident and domiciled in Erie city, and voted there. He was rated for the years 1835, 1836, and 1837, for \$500—the salary of his office. The State law was, that an account should be taken “of all offices and posts of profit,” and that it was the duty of assessors “to rate all offices and posts of profit, professions, trades, and occupations, at their discretion, having a due regard to the profits arising therefrom.” It was plain, therefore, that the tax was on the *emoluments* of the office, and not simply on the office. But whether it was the one or the other, it was pointed out by Mr. Justice Wayne, who delivered the judgment of the court, that the tax could not be sustained.

The learned judge said, at p. 445: “The emoluments of the office, then, are taxable, and not the office. But whether it be one or the other, we cannot perceive how a tax upon either conduces to comprehend within the terms of the Act the office or the compensation of an officer of the United States. It will not do to say, as it was said in argument, that though the language of the Act may import that offices and posts of profit were taxable, that it was the citizen who holds the office whom the law intended to tax, and that it was a burden he was bound to bear in return for the privileges enjoyed and the protection received from government; and, then, that the liability to pay the tax was a personal charge, because the person upon whom it was assessed was a taxable person.”

In answer to such suggestions, the learned judge proceeded to say: “The obligation upon persons to pay taxes is mistaken, and the sense in which a tax is a personal charge is misunderstood. The foundation of the obligation to pay taxes is not the privileges enjoyed or the protection given to a citizen by government, though the payment of taxes gives a right to protection. Both are enjoyed as well by those members of a State who do not, because they are not able to, pay taxes, as by those who are able

and do pay them. Married women and children have privileges and protection, but they are not assessed unless they have goods or property separate from the heads of families. The necessity of money for the support of States in times of peace or war, fixes the obligation upon their citizens to pay such taxes as may be imposed by lawful authority. And the only sense in which a tax is a personal charge, is that it is assessed upon personal estate and the profits of labour and industry," etc.

In a subsequent part of the same judgment, the same learned judge, at pp. 448-450, said: "The execution of a national power by way of compensation to officers can in no way be subordinate to the action of the State Legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the States would be different. . . .

"The powers of the National Government can only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such an amount as will secure from the officer the diligent performance of his duties. 'The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve,' without that recompense being in any way lessened, except by the sovereign power from whom the officer derives his appointment, or by another sovereign power to whom the first has delegated the right of taxation over all the objects of taxation, in common with itself, for the benefit of both. And no diminution in the recompense of an officer is just and lawful, unless it be prospective, or by way of taxation by the sovereignty who has a power to impose it, and which is intended to bear equally upon all according to their estate. The compensation of an officer of the United States is fixed by a law made by Congress. It is in its exclusive discretion to determine what shall be given. It exercises the discretion and fixes the amount, and confers upon the officer the right to receive it when it has been earned. Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States which secures it to the officer in its entirety? It certainly has such an effect; and any law of a State imposing such a tax cannot be constitutional, because it conflicts with a law of Congress made in pursuance of the Constitution, and which makes it the supreme law of the land."

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It would appear to be the result not only of this but of other cases, that the State, having no power directly to tax the income, *eo nomine*, has no power indirectly to do so by calling the income personal property and then taxing it under a new name. If such a course were permitted, it would be a plain evasion of the law : *Bank of Commerce v. The City of New York* (1), *Bank Tax Cases* (2).

The conclusion, according to Pomeroy's Constitutional Law, sec. 305, to be drawn from all the cases may be summarily stated as follows : " States may exert their power of taxation generally upon persons and property within their boundaries ; but they cannot thereby interfere with any of the functions of the nation. They cannot tax national property ; or the evidences of the national debt owned by individuals ; or banks incorporated by the nation as a part of its general scheme of finance ; or salaries of national officers. *In a word, all the means which are employed by the nation to carry on its legitimate functions are entirely beyond the reach of the several States.*" See further, Cooley's Constitutional Limitations, 2nd ed. 482 ; Cooley on Taxation, 56 ; Hilliard on Taxation, 148 ; Sedgwick on Constitutional Law, 2nd ed., 507 and note.

If this be a sound conclusion under the Constitution of the United States, where the reserved powers are with the States or the people—and there it is now beyond question the law of the land—it cannot be less sound as applied to our Constitution, where the reserved powers, I think, appear to be with the General Government.

The converse of *Dobbins v. Commissioners of Erie County* (3), arose in *The Collector v. Day* (4), where an attempt was made by the National Government to tax the salary of a judge appointed by a State, and was for similar reasons held to be unconstitutional.

The principles to be deduced from the cases appear to be, that the National Government and the State Governments are, as it were, distinct sovereignties ; that the means and instrumentalities necessary for the carrying on of either Government are not to be impaired by the other ; that as the power to tax involves the power to impair, the exercise of such a power by the one Government on the income of the officers of the other is inconsistent with independent sovereignty of the other ; and that in such cases exemption from taxation, although not expressed in the National Constitution, exists by necessary implication.

(1) 2 Black, 620.  
(2) 2 Wallace, 200.

(3) 16 Peters, 435.  
(4) 11 Wallace, 113.

These principles appear to me to be, if possible, more applicable to our Constitution than to that of the United States of America.

It does not, however, follow from them that railway corporations and other corporations created by or under the authority of the Dominion Legislature for *other* than Government purposes, would be more free from municipal taxation than companies incorporated by the Provincial Legislatures.

For these reasons I concur in the decision of the learned judge who tried the cause.

In my opinion the rule *nisi* should be discharged.

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MORRISON, J. :—

After the best consideration I have been able to give to this case, I have arrived at the conclusion that our judgment should be in favour of the defendants.

The B. N. A. Act defines by sections 91 and 92 the exclusive objects of legislation which are respectively within the jurisdictions of the Parliament of Canada and the Provincial Legislatures. The terms used designating such respective objects, classes, and powers of the Local Legislatures, are necessarily general, and in some instances difficult of an accurate or certain interpretation when it becomes necessary to define in detail what matters are or are not within the particular class, or are limited or excluded by some other power or class assigned to the Parliament of Canada. Among these terms are sub-sec. 8 of sec. 92, "Municipal institutions in the Province;" sub-sec. 13, "Property and civil rights in the Province;" sub-sec. 16, "Generally all matters of a merely local or private nature in the Province"

In neither sections 91 nor 92 is there to be found any expression indicating the exemption of any person, or the property or income of any person, from taxation, whether Dominion, Provincial, or Municipal. We have therefore to consider whether there is anything to be found in any of the respective powers implying any exemption, or whether there is any principle authorizing us to imply that the officers or employees of the Dominion Government are not liable to be assessed or taxed for municipal purposes as other residents within a municipality.

That the subject of exemption from taxation was considered by the framers of the B. N. A. Act is apparent from section 125, which declares that "No lands or property belonging to Canada or any Province shall be liable to taxation."

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It appears to me that this express exemption of public property determines the limit of exemption, and by implication all other property is liable under the respective powers conferred by the 91st and 92nd sections.

Under the class "Municipal institutions within the Province," the making of a law for the assessment of personal property for municipal purposes is certainly a law in relation to a matter within that class, and is consequently within the exclusive power of the Provincial Legislature; but it is argued that upon some general principle, which we are to imply, the officers and employees of the Dominion Government are not liable to the same extent of taxation for municipal purposes as other residents.

There is no such principle or usage that I am aware of recognised in England; but it is said that our system of government and constitution is like that of the United States, and we have been referred to cases decided in the United States courts as indicating the principle I have referred to; and it has been argued that our system of confederation is so similar to that of the United States that the grounds upon which those decisions have been decided are applicable to the state of things existing in this country and the respective powers of the Dominion Parliament and the Provincial Legislatures. But it seems to me those cases are quite distinguishable, and were decided upon grounds and for reasons that do not apply here.

The several States of the Union are sovereign independent States. Their Constitutions and powers are not expressly designated or limited, but the Constitution of the United States is limited; as said by Chancellor Kent (1), it "is an instrument containing the grant of *specific powers*, and the Government of the Union cannot claim any powers but what are contained in the grant, and given either expressly or by necessary implication."

The distinguishing character of our system is, that the B. N. A. Act is an Act of the Imperial Parliament conferring certain specific powers upon the Parliament of Canada, and certain specific powers upon the Provincial Legislatures, with this other important difference from the Federal Constitution of the United States, that the Dominion Government have in their hands a check upon the Legislatures of the Provinces in the power of disallowing any statute passed by them, and so may prevent any legislation which tends to

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(1) Kent's Com., Vol. 1, 12th ed., p. 313.

obstruct, defeat, or impede the constitutional acts of the Dominion Parliament or Government. The Provincial Legislature is in that respect not like a sovereign State of the Union, but subordinate to that of the Dominion Government, and there are consequently not those grave difficulties and dangers to be apprehended here, as suggested in the cases in the American courts, from the Legislatures of the States of the Union, and which no doubt pressed upon the learned judges of the Supreme Court who had to consider the cases we have been referred to.

I may here remark that this is not the case of the Local Legislature enacting that the officers of the Dominion Government shall pay any particular tax, or that the office itself shall be taxed ; but the Act complained of is, the exercise of an alleged municipal right to assess personal property of residents within the municipality.

The Assessment Act, 32 Vict. c. 36, O., and the amending statute 34 Vict. c. 28, O., are unquestionably constitutional. They contain no clause or provision in violation of the B. N. A. Act. All that can be said is that the officers of the municipality of Ottawa, under the authority of the Assessment laws, assessed the plaintiff for his personal property in the manner pointed out in the 35th section of the 32 Vict., which provides that the ratepayer's last year's income in excess of \$400 shall be held to be his net personal property for the current year, unless he has other property liable to assessment, in which case such other property and such excess shall be added together and constitute his personal property liable to assessment.

The cases we have been referred to in the United States courts, more particularly the leading case of *McCulloch v. The State of Maryland* (1), are, I think, quite distinguishable, and do not apply. The general principle laid down is, that the several States have no power of taxation or otherwise to retard, impede, burden, or restrain in any manner the powers vested in the General Government ; but the principle so laid down in that case has been limited by a subsequent judgment of the Supreme Court in the case of *The National Bank v. Commonwealth* (2).

Mr. Justice Miller, who delivered the judgment of the court, after stating that the principle laid down in *McCulloch's* case had been repeatedly affirmed, said, at p. 361 : " The doctrine has its foundation in the proposition, that the right of taxation may be so

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(1) 4 Wheaton, 316.

(2) 9 Wallace, 353.

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used in such cases as to destroy the instrumentalities by which the Government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the Government are to be wholly withdrawn from the operation of State legislation. The most important agents of the Federal Government are its officers, but no one will contend that when a man becomes an officer of the Government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation—a limitation growing out of the necessity on which the principle itself is founded. The limitation is, that the agencies of the Federal Government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that Government. Any other rule would convert a principle founded alone on the necessity of securing to the Government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime."

And, again, in *Thomson v. Pacific R. W. Co.* (1), Chief Justice Chase, in delivering judgment, says, in commenting on *McCulloch v. Maryland*: "It is true that some of the reasoning in the case of *McCulloch v. Maryland* seems to favour the broader doctrine. But the decision itself is limited to the case of the bank, as a corporation created by a law of the United States, and responsible in the uses of its franchises to the Government of the United States. . . . We do not think ourselves warranted, therefore, in extending the exemption established by the case of *McCulloch v. Maryland* beyond its terms. . . . We do not doubt the propriety or the necessity . . . of maintaining the supremacy of the General Government within its constitutional sphere. We fully recognise the soundness of the doctrine, that no State has a 'right to tax the means employed by the Government of the Union for the execution of its powers.' But we think there is a clear distinction between the means

employed by the Government and the property of agents employed by the Government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always or generally taxation of the means.

"No one questions that the power to tax all property, business, and persons within their respective limits, is original in the States, and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in Government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection.

"We perceive no limits to the principle of exemption which the complainants seek to establish. It would remove from the reach of State taxation all the property of every agent of the Government. Every corporation engaged in the transportation of mails, or of Government property of any description, by land or water, or in supplying materials for the use of the Government, or in performing any service of whatever kind, might claim the benefit of the exemption."

The case of *Dobbins v. Commissioners of Erie* (1), upon which the plaintiff chiefly relies, is, I think, also distinguishable. That case was rested upon the provisions of an Act of Congress authorizing the collection of duties, and for that purpose the use of revenue cutters and officers to command them, and the Act of Pennsylvania providing that an account should be taken of all offices and posts of profit, and making it the duty of assessors to rate all offices and posts of profit at their discretion, etc. The court held that the officer who was in command of a revenue cutter was, equally with the vessel, her guns, etc., means to enforce the law, and that a tax upon such an officer was an interference with the constitutional means of the United States, within the principle laid down in *McCulloch's* case. I am not at all disposed to admit that that decision was a sound one. I may also refer to the case of *The Collector v. Day* (2) to shew that the decision in *Dobbins' case* was rested mainly upon the ground that he was captain of a revenue cutter.

Nelson, J., in delivering judgment, said, at p. 127, the rule and principle of the case (*Dobbins*) was, that "the exemption rests

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upon necessary implication, and is upheld by the great law of self-preservation; as any Government whose means employed in conducting its operations, if subject to the control of another and distinct Government, can exist only at the mercy of that Government. Of what avail are these means if another power may tax them at discretion?"

I cannot see that such reasoning can apply to the relations existing between the Government of the Dominion and the Provinces, or to the case of this plaintiff, or any clerk or person employed in any office of the Dominion Government.

I also refer to the case of *Melcher v. City of Boston* (1), a case somewhat like the one before us, as shewing the view entertained by the learned judges of the Supreme Judicial Court of Massachusetts, of the decision in the case of *Dobbins*.

The learned judge who delivered the judgment of the court said, p. 75: "The plaintiff relies upon the case of *Dobbins v. Commissioners of Erie*, as an authoritative decision governing the present case. Giving to that decision all the force and effect of a judgment of the highest tribunal, upon the question there raised, yet there arise, in the case at bar, two important questions for our consideration. 1st. Was the plaintiff an officer of the United States, in any such sense as would entitle him to the immunities from taxation which were adjudged to attach to *Dobbins*, as a captain of the United States revenue cutter? 2nd. May not a tax upon 'income' be assessed upon all citizens of Massachusetts residing therein, as well where such income is derived from the National Government, by way of compensation for services rendered to it, as from any other source?" And after referring to the Act of Congress regulating the post-office department, and the position of the plaintiff as a clerk, etc., he said:—"The case in 16 Peters, 435, already referred to, was essentially different. *Dobbins* was a captain of the United States revenue cutter. He was an officer of the United States, appointed by the President, under the provisions of a statute creating the office. It was a clear case of one holding an office under the United States Government. The statute of Pennsylvania, under which the question arose, authorized the assessment of a tax 'upon all offices and posts of profit.' The tax was upon the office. The taxing power assumed to deal with him as one holding an office. In the case at bar, no such recognition of the party as a public officer exists, and no tax was assessed upon the office. . . .

"As it seems to us, the plaintiff has failed to bring himself within the case of *Dobbins v. Commissioners of Erie*; not being an officer of the United States in any such sense as will exempt him from taxation in common and in the like manner with all other citizens and residents of Massachusetts. He is therefore liable to taxation 'for income,' and that as well for income derived from compensation for services rendered to the National Government, as from any other source."

The learned judge then says that it is not necessary to express any opinion upon the second question, whether a tax upon "income" may not be well assessed upon one holding a public office under the General Government, and proceeds, at p. 77: "But we deem it proper to say, that such form of taxation may present a different question, and authorize a different decision from that in *Dobbins*' case. The tax upon income is not a tax upon the office directly. It would seem to be only carrying out the great principle of assessing taxes proportionally and equally, according to the ability of the persons taxed. Its form is unobjectionable, pointed at no particular class, whether office-holders or otherwise, but embracing, as proper subjects of taxation, all who place themselves under the protection of our Local Government, and participate in common with others in the free enjoyment of our schools, our humane institutions, the protection of our laws and the benefits resulting from their due administration, our public ways, and all those beneficent objects for which these taxes are assessed. We are not disposed to assume in advance that the Supreme Court of the United States will decide that a tax 'upon income' will be illegal, if assessed upon a resident of Massachusetts, deriving his income from the compensation allowed him for services as an officer of the United States."

The court held that the tax was properly demanded of the plaintiff. The judgment in this case seems to have been acquiesced in, as it does not appear to have been carried further. It seems to me to be a decision quite applicable to the case now under judgment.

If the principle or rather suggestion of impairing the efficiency of the officer, by reason of his pecuniary means being affected by such taxation, can be invoked to entitle the plaintiff to exemption, upon the like principle every employee of the Dominion Government ought to be exempt from any law which might be passed compelling payment of debts by the application or attachment of any moneys, the proceeds of an officer's income or emolument received by him. And it would be pushing the principle of implication to an unrea-

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sonable length to assume that the Dominion Government, when fixing salaries, etc., did so contemplating such immunities from taxation. If they entertained such a view, we may assume that the Government would have so indicated by some legislative enactment. If the Dominion Parliament, under sub-s. 8, sec. 91, had enacted that all the salaries and allowances of its officers should be exempt from Provincial or municipal taxation, I should have had difficulty in saying whether such an Act would be constitutional, or not an encroachment upon the powers conferred on the Provincial Legislature.

The Dominion Parliament has not so declared. As said by Chase, C. J., in *Thomson v. Pacific R. W. Co.* (1), when Congress has not interposed to protect and exempt their officers or employees, the taxation in question is not obnoxious to the principle contended for by the plaintiff.

The general rule in construing statutes is, that where a general power is conferred, any particular power is also conferred; and so in the case of *L'Union St. Jacques de Montreal v. Belisle* (2), the Privy Council observe that the scheme of enumeration in the B. N. A. Act was to mention various categories of general subjects which may be dealt with by legislation. "Such legislation," they said, p. 36, "is well expressed by Mr. Justice Caron when he speaks of . . . *faillite*, bankruptcy and insolvency, all which are well-known legal terms, expressing systems of legislation with which the subjects of this country, and probably of most other civilized countries, are perfectly familiar. The words describe in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including, of course, the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation."

And so in like manner the terms "Municipal institutions in the Province" necessarily include the whole government of municipalities, and the subject of taxation upon all persons and property within the municipality. And, as an example of the wide interpretation put on the classes of subjects enumerated in sec. 92, I may refer to *Dow v. Black* (3). It was there argued that the second

(1) 9 Wallace, 579, 591.

(2) L. R. 6 P. C. 31; *ante*, p. 63.(3) L. R. 6 P. C. 272; *ante*, p. 95.

class, "direct taxation within the Province in order to the raising of a revenue for Provincial purposes," only meant a revenue for general purposes, that is, taxation incident to the whole Province. But their Lordships of the Privy Council saw no ground for giving so limited a construction to the class; but they held that it enabled the Provincial Legislature, whenever it saw fit, to impose direct taxation for a local purpose upon a particular locality within the Province.

I may also refer to section 129 of the B. N. A. Act, which declares that all the laws in force in the Province shall continue as if the union had not been made, subject to be repealed, abolished, or altered by the Parliament of Canada, or the Legislature of the Province, according to the authority of the Parliament or the Provincial Legislature.

Now, in Ontario the right to tax the personal estate and income of officers of the Government, in common with all others, existed at the time of the passing of the B. N. A. Act. It is true that for some special reason the officers of the then Government residing at Ottawa were exempt—not, I take it, as a matter of right, but for some special reason at the time. In 1869 the Ontario Assessment law was repealed, but virtually re-enacted, exempting the like officers of the Dominion Government, and by the 34 Vict. c. 28, O., this exemption was repealed. Can it be said that the Ontario Legislature acted unconstitutionally in doing so? I think not, and if the authority to assess officers of the Government existed at the time of and after Confederation, the Parliament of Canada, if the right of so exempting its officers is within any of its powers, has not in any way repealed or abolished the right of the Province to do so.

If the plaintiff is right in his contention, and the principle is pressed to its consequences, any officer or employee in the service of the Dominion, such as the customs, excise, the post-office department, in the public works and government railways, and various other officers, would be equally exempt.

On the whole, I see no ground, either by implication or otherwise, for holding that this plaintiff is exempt from the operation of our Assessment laws or the mode of assessing and arriving at the amount of his personal estate which he complains of. I cannot apply the reasoning upon which the American authorities are based, and say that this assessment is a tax on the operations of the Dominion Government, or, to use the words of the learned judge of the

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Supreme Court of the United States, on one of its instrumentalities, in the sense used by them.

I think the defendants are entitled to our judgment, and that the rule should be absolute to enter a verdict for them.

WILSON, J. :—

It is plain that the Assessment Act, 32 Vict. c. 36, s. 9, O., amended as it has been by 34 Vict. c. 28, s. 1, O., does not exempt the income of officers of the Dominion residing in Ontario.

The general enactment of that statute is, that all land and personal property in the Province of Ontario shall be liable to taxation, subject to certain exemptions :—

And personal property is, by section 4, declared to include all goods, . . . income, and all other property, except land and real estate, as defined by section 3.

And by section 5 : Property includes both real and personal property, as above defined.

Some of the exemptions are those in the following sub-ss. of sec. 9 :—

11. The personal property and official income of the Governor-General of the Dominion of Canada, and the official income of the Lieutenant-Governor of the Province.

13. All pensions of \$200 a year and under, payable out of the public moneys of the Dominion of Canada, or of the Province.

14. The income of a farmer, derived from his farm; and the income of merchants, mechanics, or other persons, derived from capital liable to assessment : 33 Vict. c. 27, s. 2.

21. The annual income of any person, provided the same does not exceed \$400.

22. The stipend or salary of any minister of religion, and the parsonage or dwelling-house occupied by him, with the lands thereto attached.

The repeal of the 25th sub-section, which in express terms applied to this case, is a very significant fact against the allowance of such an exemption.

But it is said, if this claim cannot be supported on the ground of an exemption, that it is still maintainable, because it is an unconstitutional tax which the Local Legislature cannot impose. That, of course, can only arise under the Confederation Act.

Section 91 confers upon the Dominion Legislature exclusive authority over a variety of matters, and among others over :—

Sub-section 3 : The raising of money by any mode or system of taxation.

Sub-section 8 : The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.

Section 92 confers upon the Provincial Legislature exclusive authority over the following, among other matters :—

Sub-section 2 : Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes.

Sub-section 8 : Municipal institutions in the Province.

Sub-section 13 : Property and civil rights in the Province.

Sub-section 16 : Generally all matters of a merely local or private nature in the Province.

Section 125 enacts that no lands or property belonging to Canada or any Province shall be liable to taxation.

I am quite sure that section 91, sub-section 3, does not apply, because that refers to the raising of money by the Dominion Legislature by any mode or system of taxation, and this is not a case of that kind.

Nor does sub-section 8, because the power, which seems an essentially needful one, that the Dominion Parliament should fix and provide for the salaries of the civil and other officers of the Dominion, cannot by any interpretation be held to exclude the right of assessment of that salary by the Provincial Legislature.

Section 92, sub-section 2, does not apply here, because that is confined to taxes imposed by the Legislature for Provincial purposes.

Sub-sections 8, 13, and 16 do, however, apply, and by them the Local Legislature has the power to tax, or to exempt from taxation, or to confer upon municipalities the power to tax the salaries of Dominion officers.

The assessment in question is one imposed by municipal authority. It is also an assessment made in respect of *property* as defined by the Assessment Act ; and it is really in respect of matters of a merely local or private nature in the Province, because the amount so raised or to be raised is to be applied to merely local or private matters in the municipality of the city of Ottawa.

The only ground upon which an exemption can be claimed by the plaintiff is, that the Dominion Government having employed him, and having given him a remuneration for his services, that it

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would be or might be detrimental to the public interest if that remuneration should be lessened by any municipal burden put upon him, taxing that income, inasmuch as the payment made to him must be presumed to be necessary for the due performance of his duties and the maintenance of that proper social position and dignity required of a public officer.

It is upon that ground, and for that cause partly, but not altogether, that the half-pay of an officer cannot be attached or assigned. Such allowance is partly in respect of services thereafter to be rendered; but it is not a permanent grant—it is voluntary, and may be withdrawn at any time: *Flarty v. Odum* (1).

In *Ex parte Hawker, Re Keely* (2), it was held the retiring pension of an officer could not be taken by the assignee in bankruptcy.

In *Dent v. Dent* (3), it was held that the pension of a retired officer, received wholly in respect of past services, was liable to sequestration—but that half-pay could not be taken, as it was partly in respect of future services. The sequestration would relate only to pay actually due: *Knight v. Bulkeley* (4).

A superannuation allowance is not a debt which can be attached: *Innes v. The East India Co.* (5).

It is clear that the assignment of a salary of a public officer would not be supported.

The assignment of the whole of a pension for past services, or of half-pay, or of an annuity granted by Parliament to maintain the dignity of a title—as in *Davis v. Duke of Marlborough* (6)—or of the pay of an officer, or the attaching them for debt or taking them in insolvency, so far as it can be done or cannot be done, are entirely different from this case, which is the claim to exemption for payment of an ordinary municipal tax upon a salary or income, which every one else with a few exceptions is subjected to.

The doctrine of public policy, which is treated of very freely in the different cases on the subject of pay and pensions before referred to, and in the others which are therein cited, is in no way violated by a tax of this kind. The plaintiff, as a public officer, is not a person over whom the Dominion Legislature has exclusive jurisdiction, and it cannot be said that the imposition of the tax upon his income is an unwarranted interference with him by the municipality under the authority of the Local Legislature.

(1) 3 T. R. 681.

(2) L. R. 7 Ch. 214.

(3) L. R. 1 P. &amp; D. 366.

(4) 4 Jur. N. S. 527.

(5) 17 C. B. 351.

(6) 1 Swanston, 74.

He might with more reason claim to be exempt from statute labour, or from the requirement to remove snow, ice, etc., from the sidewalk opposite his house, because that might take him away from his public duty.

He would, but for the special exemption granted to him and to many others by the jury law, be liable to serve as a juror.

He has no privileges but such as are specially given to him. His office or duties give him none. He is subject to arrest like any other person.

The case of *McCulloch v. The State of Maryland* (1), determined that a bank established by the National Government of the United States could not have a tax upon its issues imposed upon it by a State in which it had established a branch bank, nor could it be restricted by such State to the issue of notes of such denominations as it prescribed.

The charter also provided that the collectors and receivers of the national revenue should receive payment in the notes of that bank, while the State of Maryland declared that it should be penal to pay in such notes unless they were first duly stamped by the authority of that State.

The court held that the tax was upon the franchise which Congress had created, and that the tax was unconstitutional.

But it is expressly declared that the real property of the bank in the State was liable to taxation, and also the proprietary interest which the citizens of the State held in the bank in common with others.

So also *Weston v. The City of Charleston* (2) determined that a tax imposed by any State, or under the authority of any law of the State, upon stocks issued for loans made to the National Government was unconstitutional, because it was a tax upon the contract which the Government had made with the holders of the stocks that they should receive upon it a certain interest or benefit, and any such tax would operate prejudicially to the credit of the Government.

Two of the dissenting judges intimate that if the tax had been on the income of the holder of the stock in common with his other sources of income, in place of the stock *eo nomine*, it might not have been objectionable.

The plaintiff contends that if the franchise of a bank corporation, or the stocks of the United States, each of them created by the

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(1) 4 Wheaton, 316.

(2) 2 Peters, 449.



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National Government, cannot be taxed, neither can he be taxed, because he in his own person as a public officer, receiving a public salary, stands on quite as good a vantage ground as such a corporation, or as such stock; and that he is as much the principal with respect to the tax in question as the franchise or the stock was in the two cases just mentioned.

I do not think he can maintain that, because there is no tax put upon him as a public officer, nor is there a capitation tax put upon him in any form. His income is taxed. That of course reduces his salary, and the fear on the ground of policy is, that it may diminish his zeal for and his usefulness in the public service.

That is the danger to be averted, and the difficulty we are called upon to meet.

The case of *Dobbins v. Commissioners of Erie County* (1) is one which does, it was contended, apply in favour of the plaintiff. In that case the State, under the words "all offices and posts of profit," imposed a county rate upon the captain of a revenue cutter, an officer of the National Government, and it was held that such a tax could not be supported.

The court, at page 449, said: "The officers execute their offices for the public good. This implies their right of reaping from thence the recompense the services they may render may deserve, without the recompense being in any way lessened, except by the sovereign power from which the officer derives his appointment."

*The Collector v. Day* (2) decided the converse case to the last, —that a State judicial officer could not be taxed by the National Government.

These cases do not in the least apply to the claim of the plaintiff.

I am not much impressed with the force or reasoning of the case of *Dobbins v. Commissioners of Erie County* just mentioned. In that case the National Government had a certain jurisdiction over the officer, and so also had the State Government. He was accountable to the National Government for nothing but his official conduct. He was amenable to the State Government, while a citizen of it, for everything else and in every other respect. And why his income, as distinct from his office or post, should not be subject to local taxation in like manner as that of every other citizen of the State, I do not quite understand.

If the tax had been on the income of all officers of the National

(1) 16 Peters, 435.

(2) 11 Wallace, 113.

Government, or had been in any way restrictive or exceptional, I could understand the objection that was made to it. But when it subjected him to the like and to no other or greater liability than was imposed on every citizen over whom, in common with himself, the State had jurisdiction, the conclusion that was come to seems to me inconsequential, and the grounds of it very imaginary.

The case of *Melcher v. City of Boston* (1) is very much opposed to the one before referred to.

But granting it full authority in cases under the like circumstances, it does not follow that it is entitled to prevail here.

The Local Legislature had at the time of confederation full power over such a tax, and that power is expressly granted to it, or rather has been preserved to and reserved for it, under the head of "Municipal institutions."

That these salaries were at that time by a special clause of exemption not then taxed does not alter the case, because the power over all such matters remained with, or was granted to, the Local Legislature and to these municipal bodies to deal with as theretofore, and that which had before been an exemption could not have been understood as intended always to be an exemption, or to be an irrevocable declaration that such salaries never would be taxed.

I cannot conceive that such a power to deal with exemptions as we pleased which unquestionably existed before, and at the time of confederation, and which has not been interfered with, directly or indirectly, by that Act, can now be questioned on the fanciful ground that the like tax put on the plaintiff's income or salary which is put upon all other incomes of every kind, but a few which have been excepted, can be considered illegal and unconstitutional because it is an assumption of power, or because it is opposed to public policy, or that its tendency is to diminish the plaintiff's usefulness in the public service by reducing his salary below the amount which the Dominion Government has thought fit to estimate his services and usefulness at. That a grant or seizure of the salary for debt should not be allowed, is comprehensible, but that an income tax should be illegal is not to me reasonable. These two matters are different in their nature, consequence and purpose, and are not to be confounded by any generalities that a right to tax is a right to destroy. The municipality was also dealing, as it has the right to do, with a matter affecting property and civil rights, for income is

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expressly property by the Assessment Act. The question must always be, and only be, is there the power to tax?

If there is, there is nothing more to be said. If there is not, that also puts an end to enquiry.

The opinion whether there is such power or not may and will depend upon many considerations of more or less importance, and the consequences of either view must also be considered as aids to the judgment to be formed, but only as aids, for the question must still come back to this point: is there, or is there not, such a power?

In my opinion there was, and there is, such a power to tax; and the rule should be made absolute for the defendants, treating the plaintiff, as I have throughout, as an officer of the Dominion Government.

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JUDGMENT OF MOSS, J. (*before whom the case came in the first instance*).

[*Reported 40 U. C. Q. B. 478.*]

Moss, J.:—

As the learned counsel candidly informed me at the outset, this is a test case, and it is intended to ultimately obtain an expression of opinion from the Supreme Court of the Dominion upon the question involved. My own individual opinion, therefore, is a matter of little importance, and I might, without any impropriety, have contented myself with entering a verdict *pro forma*. But as I am desired to express an opinion, I shall endeavour to do so before entering a verdict.

This case is one of considerable difficulty; the time and opportunities I have had to investigate the subject have been wholly inadequate to that full consideration which it must ultimately receive; and I have made no attempt to reduce my views to writing. I have endeavoured, however, to form an opinion upon the various points submitted to me by the learned counsel in the course of their able argument.

The question which it seems convenient first to consider is, whether, upon the proper construction of the Assessment Acts of Ontario, the income of an officer of the House of Commons is liable to taxation. On behalf of the plaintiff in this case, who is an officer of the House of Commons, and whose salary is payable in the manner stated in the admissions, it was argued that upon the

true construction of the Assessment Acts, the Legislature of Ontario, so far from imposing any charge upon the income of such an official, had declared it to be exempt. With this contention I am not able to agree. By the Act of 1866, which was in force at the time the B. N. A. Act was passed and Confederation established, the salaries of officials in the position of the plaintiff were exempt; and in the Ontario statute of 1869, relating to the assessment of property, that exemption was continued, the language of the statute being only varied from that of 1866 so far as the changed circumstances of our political condition rendered necessary. By the Act of 1869 it was clear that these official salaries were not subject to taxation. Sub-section 25 of section 9 expressly includes, among the exemptions from liability to taxation, the annual official salaries of the officers and servants of the House of Commons resident at the seat of government at Ottawa. The plaintiff is a servant of the House of Commons, resident at the seat of government at Ottawa, and therefore if that clause had continued in force he would have been exempt by the express enactment of the Legislature. But sub-section 25 of section 9 of that Act was repealed by the Act of 1871, and therefore, in the existing statute law of the Province, there is no express exemption of the salary of a person occupying the position of the plaintiff.

But it was argued that an exemption was constructively contained in sub-section 12 of the same section, which exempts any pension, salary, or gratuity or stipend derived from Her Majesty's Imperial Treasury or elsewhere out of this Province. The contention of the plaintiff was, that this was a salary derived out of this Province. I do not think that exemption extends to the present case. The course of legislation seems to me to be quite opposed to this construction being placed upon sub-section 12. That sub-section is to be found in the Acts of 1866 and 1869, and contains precisely the same words "or elsewhere out of this Province." Notwithstanding the use of these words, the Legislature, when it desired to manifest its intention of exempting such salaries, deemed it necessary to use express language. This appears equivalent to a legislative declaration that the words in the 12th sub-section did not cover the case. If they did, the express exemption in the 25th sub-section was wholly unnecessary. It may be said that this was done for greater precaution. But, even if that explanation was otherwise satisfactory, what is to be said of the repeal of sub-section 25 by the Act of 1871? It cannot admit of serious doubt, I think, that the

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intention of the Legislature in repealing the Act was to remove these official salaries from the list of exemptions. On the whole, I think that upon the construction of the Ontario Assessment Acts the Legislature of Ontario have not exempted the incomes of officers of the House of Commons from liability to assessment.

The grave question then arises, whether the Provincial Legislature had power to impose a tax upon the salaries of such officers. I need not say that I approach the solution of this question with very grave doubt and very great hesitation. It is a constitutional question, involving delicate considerations and affecting very considerable interests. The best conclusion which I have been able to form is, that upon the construction of the powers which are vested in the Legislature of Ontario, the officers in the position of the plaintiff are not liable to be assessed upon their incomes. I look first, as I am bound to look, at the language of the B. N. A. Act. Upon the terms of this statute the defendants relied for finding the power to impose a tax upon these incomes. The 2nd, 8th, and 13th sub-sections of the 92nd section are the clauses upon which the defendants mainly rely. The object of the 92nd section was, to define the matters with which the Provincial Legislature should alone have the power to deal, and to describe the subjects which should be withdrawn from the legislative control of the Dominion Parliament. The 2nd sub-section gives the Legislature of each Province power to legislate in relation to direct taxation in the Province, in order to the raising of a revenue for Provincial purposes. I am of opinion that the assessment in question cannot be said to be a matter of direct taxation in order to the raising of a revenue for Provincial purposes. It is an assessment levied for raising moneys for municipal purposes. Then the Legislature of each Province has also power, by the 8th sub-section, to make laws relating exclusively to matters coming within the class of municipal institutions in the Province. Now, no doubt, under this sub-section, it belongs to the Provincial Legislature to determine generally the mode of assessment for municipal purposes, and on what property taxation should be levied. The power to authorize the mode of assessment and levy of taxes for municipal purposes, it may be conceded, is impliedly contained in the power to legislate generally with respect to municipal institutions. But the extent and limits of this power are not expressly stated. It arises by implication and necessary intendment, not by express enactment. I do not think that that section of itself contains any express authority to levy such a tax as that in question. The 13th sub-section,

which gives the exclusive legislative jurisdiction over property and civil rights, does not appear to me to be applicable.

On the whole, I do not find in the B. N. A. Act that there is an express provision either authorizing or prohibiting any tax on such incomes. That being the case, there being no express provision, and the instrument which forms the great charter of our Constitution being silent on the subject, it appears to me that the Court will have to consider the question in relation to the Federal character of the Dominion.

The question has been frequently considered in that aspect in the United States. Numerous decisions of the Supreme Court and of the State Courts were referred to by the learned counsel during the argument. Now, it is quite true, as suggested in the argument, that these decisions are not binding upon the humblest judge of this Province, but they are the opinions of eminent jurists, distinguished for learning, and deeply versed in the solution of questions of constitutional law. I think, therefore, that their reasoning will probably be found to furnish us with a safe guide in the determination of these questions. This reasoning seems to me cogent and conclusive. It is so entirely applicable to the case in hand, that I could not come to any other conclusion than that I have indicated without being prepared to impugn its correctness. I have said that I find no express provision in the B. N. A. Act either authorizing or prohibiting this assessment. Now, the Courts of the United States have proceeded directly upon the assumption that there is no express provision which regulates this subject. They do not proceed upon the construction of any particular language in the Constitution, but they place their decisions upon the foundation of broad and general principles. They rest them upon the character of the essential relations existing between the Federal Government and the State Governments, and upon the estimate of the powers which must be vested in or removed from each respectively. Now, in the great case of *McCulloch v. Maryland* (1), in which that eminent jurist, Chief Justice Marshall, pronounced judgment, he laid down the principle that the States have no power of taxation or otherwise to retard, impede, burden, or restrain in any way the powers vested in the General Government. That was the general doctrine upon which the judgment of the Court proceeded in that important case. The learned Chief Justice very fully considered the nature of the relations which sub-

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(1) 4 Wheaton, 316.

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sisted between the Central and State Governments, and held that it would be contrary to the character of the Federal Union to permit State legislation of a character that would impair in any way the effective execution of the general powers which had been entrusted to the central authority. In that case it was unnecessary to consider pointedly the power to tax officers of the United States upon their income, but the principles laid down were quite enough, in my opinion, to extend to such a case. In subsequent cases they were held so to extend. In the case of *Dobbins v. Commissioners of Erie County* (1), to which I was also referred by Mr. Cockburn, the question was raised expressly. There the Supreme Court of Pennsylvania held that a law was constitutional by which the State had assumed to tax an officer of the United States. The question, therefore, was raised directly and pointedly before the Supreme Court. It was held that upon the reasoning of the case in *Wheaton*, and upon the legitimate extension of its principles, such a law was unconstitutional. I cannot do better than refer to the language which was used by the learned judge who pronounced the unanimous opinion of the Court in that case. After pointing out the inanimate objects, the use of which the Constitution contemplated, and the management of which had been entrusted to the central authority, such as ships of war, which were the means of carrying out the object of the Central Government and could not be taxed by the State, he proceeded, at page 448: "Is not the officer more so who gives use and efficacy to the whole? Is not compensation the means by which his services are procured and retained? It is true it becomes his when he has earned it. If it can be taxed by a State as compensation, will not Congress have to graduate its amount with reference to its reduction by the tax? Could Congress use an uncontrolled discretion, in fixing the amount of compensation, as it would do without the interference of such a tax? The execution of a national power by way of compensation to officers can in no way be subordinate to the action of the State Legislatures upon the same subject. It would destroy also all uniformity of compensation for the same service, as the taxes by the States would be different."

Now, the reasoning employed in that case is precisely applicable to that on which I am giving my opinion. Without expressing dissent from these views, and without, so to speak, overruling the case, I could not come to any other conclusion. Our circumstances,

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it appears to me, sufficiently resemble the circumstances that existed in these cases to render the principles entirely applicable. There is but one other case to which I shall refer, *The Collector v. Day* (1). In that case Mr. Justice Nelson said: "It is conceded in the case of *McCulloch v. Maryland*, that the power of taxation by the States was not abridged by the grant of a similar power to the Government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two Governments; and also that there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the General Government. But it was held, and we agree properly held, to be prohibited by necessary implication; otherwise the States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

"These views, we think, abundantly establish the soundness of the decision of the case of *Dobbins v. Commissioners of Erie*, which determined that the States were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the Government of the United States. And we shall now proceed to shew that upon the same construction of that instrument, and for like reasons, that Government is prohibited from taxing the salary of the judicial officer of a State.

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State Governments by their respective Constitutions remained unaltered and unimpaired, except so far as they were granted to the Government of the United States."

In this case the central authority, in the exercise of its appropriate functions, appointed the plaintiff to a position of emolument. In the exercise of its proper powers it assigned to him a certain emolument. This emolument the plaintiff is entitled to receive for the discharge of duties for which the Central Government is bound to provide. I do not find in the B. N. A. Act that there is any express constitutional prohibition against the Local Legislatures taxing such a salary, but I think that upon the principles thus summarized in the case which I have just cited, there is necessarily an implication that such power is not vested in the Local Legislature. I therefore, in accordance with these views which I have just imperfectly expressed, have thought it right to enter a verdict for the plaintiff, and I think he should have a certificate to entitle him to full costs.



## ONTARIO COURT OF QUEEN'S BENCH.

1871.

February.

REGINA v. BOARDMAN.

[Reported 30 U. C. Q. B., 553.]

*Tavern and shop licenses—B. N. A. Act, s. 91, sub-s. 27; s. 92, sub-ss. 9, 15, 16—Criminal law.*

The Legislature of Ontario having passed an Act to regulate tavern and shop licenses :

*Held*, that they had power to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise should on conviction be imprisoned in the common gaol for three months ; and that such enactment was not opposed to sec. 91, sub-s. 27, of the B. N. A. Act, by which criminal law is assigned exclusively to the Dominion Parliament.

The prisoner had complained of one George Lindsay for selling ale by retail without having obtained a license authorizing him to do so, and he compromised the matter with Lindsay by receiving \$20, and a further sum of \$5 for expenses. The chief constable of the city of Toronto made a complaint against Boardman for compromising, settling, and compounding the said offence, with a view of stopping or having the same dismissed for want of prosecution, on which the prisoner was convicted, and sentenced to three months' imprisonment in the common gaol.

The prisoner having been brought up by *habeas corpus*, Mr. Harrison, Q.C., moved for his discharge out of custody, on the ground that the Local Legislature of the Province of Ontario had no power, in passing an Act to regulate tavern and shop licenses—32 Vict. c. 32—to declare,

under sec. 32, that "Any person who, having violated any of the provisions of this Act, shall compromise, compound, or settle, or shall offer or attempt to compromise, compound, or settle the offence with any person or persons, with the view of preventing any complaint being made in respect thereof, or if a complaint shall have been made with the view of getting rid of such complaint, or of stopping or having the same dismissed for want of prosecution or otherwise, shall be guilty of an offence under this Act, and, on conviction thereof, shall be imprisoned at hard labour in the common gaol of the county in which the offence was committed for the period of three calendar months."

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Section 33: "Every person who shall be concerned in or be a party to the compromise, composition, or settlement mentioned in the next preceding section, shall be guilty of an offence under this Act, and, on conviction thereof, shall be imprisoned in the common gaol of the county in which the offence was committed, for the period of three calendar months."

Mr. *Scott*, on behalf of the Attorney-General, shewed cause against the discharge of the defendant, and contended that the other provisions of the 32 Vict. c. 32, being clearly within the authority given to the Ontario Legislature, under the B. N. A. Act, 1867, s. 92, sub-ss. 9 and 16, they had power, by sub-s. 15, for the purpose of enforcing such provisions, to pass the clauses complained of.

Mr. *Harrison*, Q.C., contra, urged that the effect of sec. 32 being to create an offence punishable by hard labour, in other words, a crime, it was an enactment relating to the criminal law, a subject exclusively assigned to the Dominion Parliament, and therefore beyond the power of the Local Legislature. He cited *In re Lucas* and

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*McGlashan* (1), and the cases there referred to; *Butt v. Conant* (2); *Regina v. Mason* (3); *In re Meyers and Wonnacott* (4).

The judgment of the Court (Richards, C. J., and Morrison and Wilson, JJ.) was delivered by

RICHARDS, C. J.:—

By the B. N. A. Act, 1867, sec. 91, the Dominion Parliament has power to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the terms in the section, it was declared that, notwithstanding anything in that Act, "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated," and amongst them, No. 27, "The criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters."

Under the head of "Exclusive Powers of Provincial Legislatures," by sec. 92 it is provided, that in each Province the Legislatures may exclusively make laws in relation to matters coming within the classes of subjects next thereinafter enumerated, and amongst other things, No. 9, "Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes." And, No. 15, "The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section." And, 16, "Generally

(1) 29 U. C. Q. B. 81.

(2) 1 B. & B. 574-5.

(3) 17 U. C. C. P. 534.

(4) 23 U. C. Q. B. 611.

all matters of a merely local or private nature in the Province."

There seems no reasonable doubt that under sec. 92 and Nos. 9 and 16, the Local Legislature not only had power, but the exclusive right to legislate in relation to shop, tavern, anctioneer, and other licenses, in order to raise a revenue.

It seems equally clear that they had the right to impose punishment by fine, penalty, or imprisonment for enforcing any law properly passed by them on matters within their exclusive jurisdiction.

Mr. Harrison in his argument referred to *Lucas v. McGlashan*, decided in this Court, and the authorities there cited and referred to, to shew that when a penalty is imposed on a defendant as a punishment for the violation of an Act of Parliament, not imposed for private purposes, but for public objects, and when such penalty is recoverable in a summary way before a Justice of the Peace, who may commit the offender to the common gaol until the penalty is paid, that the offence which may be punished in such a manner is a crime, and if so, *a fortiori* it is a crime when the punishment is imprisonment in the common gaol, and not a fine at all. And the argument was then pushed to the full extent, that the decided cases shewing that an offence so created is a *crime*, the law creating it must be a criminal law, and under the Dominion Act the power to pass criminal laws is exclusively in the Dominion Parliament.

But there can be no doubt that it was intended that the Local Parliament should not only have power, but the exclusive right to legislate on some subjects, and to impose punishment by way of fine and imprisonment for enforcing the laws they may make in relation to those subjects. We think we must therefore come to the conclusion that when the Imperial Parliament used the

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words, "The Criminal Law" and "including the procedure in criminal matters" in the B. N. A. Act, they did not mean that the Local Legislature had not the power to legislate so as to punish by fine or imprisonment, with the view of enforcing the laws, when such power is expressly given by that Act.

The conclusion which we may properly arrive at is, that they shall have the exclusive power to legislate in this way in those matters in which power is not given to the Local Legislature to legislate.

In *The Attorney-General v. Radloff* (1), Baron Martin says: "There are many *crimes*, properly so called, which are liable to be punished on summary conviction. But there are a vast number of *acts* which in no sense are *crimes*, which are also so punishable; such, for instance, as keeping open public-houses after certain hours, and a variety of breaches of police regulations, which will readily occur to the mind of any one. The bringing tobacco into this kingdom is of itself a perfectly innocent act; but the requirements of the public revenue, which induce the Legislature to impose a very high duty upon the article, probably render it matter of necessity that the bringing it into the kingdom without payment of the duty should be subjected to a penalty. But this cannot affect or alter the intrinsic and essential nature of the act itself, and it seems to me that it cannot be denominated a 'crime' according to the ordinary and common usage of language, and the understanding of mankind."

I refer to this language, not as shewing that the case in our own Court and those there cited were not properly decided, but as indicating the popular idea of criminal law, in which view it may have been used in the statute. The cases referred to by my brother Wilson, in *Lucan v.*

*McGlashan*, shew the extreme length to which the definition of crimes and criminal law and civil proceeding may be carried, such as parties being indicted for non-payment of assessments which the statute makes it obligatory on them to pay: *Regina v. Sutcliffe* (1). An innkeeper may be indicted for not receiving a guest at his inn, he having no lawful excuse for his refusal: *Rea v. Ivens* (2). And it is said [not] to be the test of an act being a crime whether an indictment will lie for it: *Bancroft v. Mitchell* (3); *Regina v. Master* (4), per Mellor, J. The old appeal of murder was a civil proceeding, though the defendant was hanged if the verdict was found against him: *Ashford v. Thornton* (5).

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These cases shew the difficulty of construing the B. N. A. Act in the rigidly technical manner that we were pressed to do on argument.

The Local Legislature then having the exclusive right to legislate in relation to shop and tavern licenses, etc., and having power to impose punishment by fine or imprisonment for enforcing that law, to encourage prosecutions for breaches of the law, and as a means of enforcing it, gives the informers or prosecutors a share of the pecuniary penalties that may be recovered for such breaches of the law, and with a like object, to secure the enforcement of the law. By the 32nd section they provide for the imprisonment, at hard labour, in the common gaol, of any person who had violated the statute, who should compound or settle the offence with any person with a view of stopping the prosecution or getting rid of the complaint. And by the 33rd section they provide a punishment for every person who shall be concerned in or be a party to such compromise or settlement.

(1) 13 Q. B. 833.

(2) 7 C. & P. 213.

(3) L. R. 2 Q. B. 549.

(4) L. R. 4 Q. B. p. 289.

(5) 1 B. & Al. 405.

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This all seems to us to be within the reasonable scope of the powers conferred on the Local Legislature. What has been done by this section was done with a view of effectually enforcing the law which they had the power to make, and which seems to be a matter of a merely local character.

If the Local Legislature were to pass a general law forbidding the compounding or settling of the offence by any person who had been guilty of a violation of local statutes, and declaring the same to be a misdemeanor for which the party could be indicted and punished by fine and imprisonment, that might with more propriety be considered as passing a criminal law and regulating the procedure in it. But in this case it seems not an unreasonable mode of ensuring the proper enforcement of the primary object of the law, the preventing of parties from exercising the calling of shop, saloon, or tavernkeeper, without obtaining and paying for the proper license for that purpose.

The object of giving half the penalty to the informer was clearly with a view of enforcing the law by the conviction and punishment of those who violated it, and the punishment of those who prevented the enforcement of the law by compromising the proceedings taken, or which might be taken, to enforce it, is for the same object, and seems not unreasonable to secure obedience to the law which they had the power to make.

We think the prisoner should be remanded for the remainder of his term of imprisonment.

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ONTARIO COURT OF QUEEN'S BENCH.

BEARD v. STEELE.

1873

[Reported 34 U. C. Q. B. 43.]

*Bill of Lading—33 Vict. c. 19, O.—B. N. A. Act, s. 91, sub-s. 2.*

A Provincial Act to the effect that all rights of suit should pass to the consignee of goods named in any Bill of Lading or to the endorsee thereof, to whom the property in the goods should be transferred by such consignment or endorsement, and that every such instrument representing goods to have been shipped should, in the hands of a consignee or endorsee for value, be conclusive evidence of shipment as against the person signing the instrument, was held not to be beyond the powers of the Provincial Legislature as being an interference with trade and commerce.

This was an action by the consignees for non-delivery of goods in accordance with the provisions of a Bill of Lading. At the trial, among other objections raised on behalf of the defendant, it was contended that the plaintiffs could not recover, as the agreement (if any) was made with other parties than the plaintiffs.

The case was tried by Galt, J., without a jury, and the plaintiffs were non-suited, leave being reserved to them to move to have a verdict entered in their favour.

Mr. *Lash* obtained a rule *nisi* to set aside the non-suit and for a new trial.

Mr. *Harrison*, Q.C., shewed cause, urging amongst other arguments (p. 49), that the Act 33 Vict. c. 19, O. (which corresponds with Imp. Act, 18 and 19 Vict. c. 111), was *ultra vires*.

Mr. *Lash* supported the rule.



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The judgment of the Court (Richards, C. J., and Morrison and Wilson, JJ.,) was delivered by

WILSON, J. :—

(P. 54) So far we have considered the case without reference to the Ontario Act 33 Vict. c. 19 (1), enacting the Imperial statute with respect to Bills of Lading, because it was said the Act of our Legislature was unconstitutional, as being an invasion of the jurisdiction of the Dominion Parliament, which alone has the power to regulate trade and commerce. We think we may safely accept this statute as passed with due authority, declaring the rights and liabilities of parties under these ordinary instruments of traffic, without infringing on the powers and authority of the Dominion Parliament, and the plaintiff's rights under that statute are admittedly free from all doubt and question.

[The remainder of the judgment is omitted, the same not having reference to the present question.]

(1) By 33 Vict. c. 19, s. 1: "Every consignee of goods named in a Bill of Lading, and every endorsee of a Bill of Lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to, and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the Bill of Lading had been made to himself."

Sec. 2. "Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee, by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in

consequence of such consignment or endorsement."

Sec. 3. "Every Bill of Lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel or train, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless such holder of the Bill of Lading shall have had actual notice, at the time of receiving the same, that the goods had not in fact been laden on board, or unless such Bill of Lading has a stipulation to the contrary: provided" that the person signing may exonerate himself in respect to such misrepresentation on certain grounds specified.

ONTARIO COURT OF QUEEN'S BENCH.

CROMBIE v. JACKSON.

1874

[*Reported 34 U. C. Q. B. 575.*]

*B. N. A. Act, s. 91, sub-s. 21—Insolvency—Property and civil rights—  
32-33 Vict. c. 16, s. 50, D.*

Section 50 of the Insolvent Act of 1869, which provided that claims by and against assignees in insolvency might be disposed of by the Judge of the County Court or by the County Court on petition, and not by any suit, attachment, opposition, seizure or other proceeding whatever, was held not to be beyond the power of the Dominion Parliament, because the right to legislate on the subject of bankruptcy and insolvency belongs exclusively to that Parliament, and because, at the passing of the B. N. A. Act there was a system of proceeding in insolvency in force in the former Provinces of Upper and Lower Canada very similar to the one established by the Act of 1869.

Demurrer. Declaration for entering a mill and taking and converting plaintiff's goods. Plea, in substance, that the plaintiff's claim to the goods and mill is under a mortgage made by one W., who, before the grievances complained of, made an assignment under the Insolvent Act of 1869, to defendant of all his estate and effects, including this mill and goods, subject to plaintiff's mortgage; that W. was then in possession of the premises, and such possession was transferred to defendant, who took possession as such assignee; and except as assignee, defendant has in no way interfered with the mill or goods: that the plaintiff's alleged right of property can be determined by the County Judge; and that this Court has no jurisdiction to try the same.

Mr. *Harrison*, Q.C., for the demurrer.

Mr. *M. C. Cameron*, Q.C., contra.

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WILSON, J. \* :—

Assuming the plea to be sufficient in substance, as shewing a good defence if the law be as it is contended it is by the defendant, I think there is no constitutional difficulty presented here.

The exclusive legislative authority respecting bankruptcy and insolvency is vested in the Parliament of Canada, and there is no interference with property and civil rights beyond what has been considered to be expedient for the purpose of making the proceedings in insolvency more efficient.

As an abstract proposition, it may be affirmed that if the Dominion Legislature were to enact that some of the exclusive matters vested in the Parliament—for instance, “Bills of Exchange and Promissory Notes”—should be litigated only in a particular local court, say the Division Court, and not in any other Court whatever, such an enactment would be unconstitutional, because it would be an encroachment on the exclusive powers which are vested in the Provincial Legislature to make laws, under s. 92, sub-s. 14, respecting “the administration of justice in the Province, including the constitution, maintenance and organization of Provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.”

It would interfere rather with that provision than with sub-s. 13 of the same section, “property and civil rights in the Province,” because the Parliament of the Dominion has express authority to interfere with property and civil rights here, so far as they are affected by legislation of the Parliament concerning “Bankruptcy and Insolvency.”

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\* This case was heard by Wilson, J., sitting alone, under the Ontario Administration of Justice Act, 1873.

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But I think it is not in this matter an enactment beyond the power of the Parliament of Canada, because at the passing of the B. N. A. Act there was a system of proceeding in insolvency in force in the two former Provinces of Upper and Lower Canada very similar to the one established by the Act of 1869, excepting it may be as to the provisions contained in the 50th section, to which I shall refer. And the B. N. A. Act must be presumed to have been passed, as Acts of Parliament always are presumed to be passed, with a knowledge by the Legislature of the then existing law and of the decisions of the Courts upon the matter which is the subject of legislation. The 50th section does not confine redress to any particular Court or person, nor exclude recourse being had to any other Court. It prescribes a certain order of procedure to be observed respecting the subjects within the operation of the section. The provision is they shall be disposed of by the judge of the County Court, or by the County Court on petition, and not by any suit, attachment, opposition, seizure, or other proceeding of any kind whatever.

But that is subject to the right of appeal, under the 83rd section of the Act, to either of the Superior Courts of law or to the Court of Chancery, or to any of the judges of these Courts, which was the provision of the law that was in operation when the B. N. A. Act was passed. See the Insolvent Act of 1865, c. 18, s. 15.

I do not think there is in this case, and on the point now raised, any valid objection established against the constitutionality of the enactment in question.

[The remainder of the judgment is omitted, the same not having reference to the present question.]

## ONTARIO COURT OF QUEEN'S BENCH.

1874

Dec. 3.

1875

March 2.

*In re* SLAVIN AND THE CORPORATION OF THE VILLAGE  
OF ORILLIA.

[Reported 36 U. C. Q. B. 159.]

*Sale of liquor—Prohibitory by-laws—Powers of Municipal Corporations—Authority of Provincial Legislature—32 Vict. c. 32, O.*

Under the exclusive legislative authority given to it with regard to "Municipal Institutions," and to "matters of a merely local or private nature in the Province," a Provincial Legislature can confer on municipal corporations power to pass by-laws wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses; and the conferring such power is not an interference with "the regulation of Trade and Commerce," assigned exclusively to the Dominion Parliament.

In Trinity Term, August 28th, 1874, Mr. *M. C. Cameron*, Q.C., obtained a rule *nisi* to quash certain by-laws of the village of Orillia.

As to No. 54, passed 20th March, 1874, for prohibiting the sale of liquors in shops and places other than houses of public entertainment, at the village of Orillia, on the ground:

That the Legislature of Ontario has no power to authorize a municipal corporation to limit the number of shop licenses, but only to authorize the imposition of licenses for the purposes of revenue.

As to No. 53, passed 17th February, 1874, for limiting the number of tavern licenses to be issued within the limits of the said village, etc., on the ground:

That the corporation had no authority to limit the number of tavern licenses; that the Legislature of

Ontario has only power to deal with licenses for the purposes of Provincial, or local, or municipal revenue, and cannot authorize a municipal corporation to limit the number of licenses to be issued, and the said by-law is beyond the jurisdiction and power of the corporation to pass.

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Of No. 54, the enacting part was as follows :

"That from and after the passing of this by-law, no shop license shall be granted within the village of Orillia, and that the sale of fermented, vinous, or spirituous liquors in shops and places other than houses of public entertainment, shall be wholly prohibited.

"That the votes of the electors shall be taken on the said proposed by-law at the following places, that is to say: at Temperance Hall, in the village of Orillia, on Friday, the twenty-seventh day of February, A.D. 1874, commencing at the hour of nine o'clock a.m., and closing at five p.m. of the same day, and that Frederick John Robert Grant, Clerk of the said municipality, shall be Returning Officer for taking the said votes.

Of No. 53, the enacting part was as follows :

"That no more than nine tavern licenses shall be issued within the limits of this corporation ; that no person convicted during the year last past of a violation of the license law shall be allowed to hold a tavern license during the current year.

"That in lieu of the sum fixed by by-laws forty-four and forty-six of this municipality, the sum to be paid for each tavern license shall be one hundred dollars over and above the Government duty, and a fee of one dollar to the Clerk of the municipality for issuing the necessary certificate for obtaining the same."

*Mr. Kenneth Mackenzie, Q.C.*, for the Government of Ontario, as to the power of the Local Government to

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authorize the municipality to pass by-laws Nos. 53 and 54, referred to the argument in the case of *Regina v. Taylor*, which was argued on the same day (1). If the Local Government do not wish a revenue from shop or tavern licenses, they may forbid their issue altogether: Sec. 92 of B. N. A. Act, sub-sec. 9.

Mr. *F. Osler*, for defendants shewed cause.

Mr. *M. C. Cameron*, Q.C., contra. The limiting the number of shop licenses is a restraint of trade, which is a matter solely under the control of the Dominion Parliament. The B. N. A. Act does not give the Local Legislature the power to delegate to municipal councils the right of deciding as to the number of licenses, or to refuse granting licenses. The prohibiting the sale of intoxicating liquors in stores is as bad as prohibiting it entirely. *Regina v. Wood* (2) shews that the right of the Legislature to confer this power to pass the by-law ought to be considered, and when power is given to a subordinate body it will not be extended by construction. The power conferred on the Local Legislature was solely for the purpose of revenue. *Elwood v. Bullock* (3) shews that municipalities cannot pass by-laws nominally for purposes of police, but really in restraint of trade; and that these by-laws for either purpose must be reasonable.

The judgment of the Court (Richards, C. J., and Morrison and Wilson, JJ.) was delivered by

RICHARDS, C. J.:—

At the time of the passing of the B. N. A. Act, 1867, the Municipal Institutions Act of Upper Canada then in force was 29-30 Vict. c. 51, passed in August, 1866.

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(1) 36 U. C. Q. B. 183.

(2) 5 E. & B. 49, 54.

(3) 6 Q. B. 383.

By the 24th section of that Act, "the Council of every township, town, and incorporated village, and the Commissioners of Police in cities," might respectively pass by-laws, amongst other things:

4. "For limiting the number of tavern and shop licenses respectively; but in no municipality shall tavern license certificates be granted in a proportion greater than one for every two hundred and fifty souls resident therein," and

9. "For prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors, in any inn or other house of public entertainment; and for prohibiting totally the sale thereof in shops and places other than houses of public entertainment; provided the by-law, before the final passing thereof, has been duly approved by the electors of the municipality in the manner provided by this Act."

At the same time there was a statute, 27-28 Vict. c. 3, in force, compelling brewers and distillers to take out licenses to manufacture spirits and beer, and imposing a duty of excise on the articles manufactured by them; and these articles were also subject to a duty on being imported into Canada, by 29-30 Vict., c. 6, on spirits and strong waters to the extent of 70 cents a gallon for proof.

The manner in which the revenue for the sale of ardent spirits by retail and in taverns was raised, was by enacting that any person who should sell ardent spirits without a license should suffer a penalty; then the mode of obtaining the license was defined, and the amount payable therefor was to be fixed, as far as the municipality was concerned, by the municipal authority.

At the time of the passing of the B. N. A. Act, there prevailed in this country a well-established mode of licensing shops and taverns.

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Shop licenses were declared in the Municipal Act of 1866, 29-30 Vict. c. 51, s. 249, sub-s. 1, to be "licenses for the *retail* of such liquors in quantities not less than *one quart*, in shops, stores, or places other than inns . . . or places of public entertainment."

And under section 252 of the same Municipal Act it was provided that "No tavern or shop license shall be necessary for selling any liquors in the original packages in which the same have been received from the importer or manufacturer; provided such packages contain respectively not less than five gallons, or one dozen bottles."

The statute under which the two by-laws, Nos. 53 and 54, were passed, was 32 Vict. c. 32, O. Sec. 40 of that Act repealed the sections from sec. 249 to 263 inclusive, of the Municipal Act of Upper Canada, 29-30 Vict. c. 51, in relation to the granting of licenses, and introduced similar provisions into the statute which was then passed.

Sec. 6 of 32 Vict. c. 32, enacted that "The Council of every township, town, and incorporated village, and the Commissioners of Police in cities, may respectively pass by-laws:" . . .

Sub-sec. 4. "For limiting the number of tavern and shop licenses respectively." . . .

Sub-sec. 7. "For prohibiting the sale by retail of spirituous, fermented, or other manufactured liquors in any tavern, inn, or other house or place of public entertainment; and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment; provided that the by-law before the final passing thereof has been duly approved of by the electors of the municipality in the manner provided by the Acts 29-30 Vict. c. 51."

Sub-sec. 8. "For appointing annually one or more fit and proper persons . . . to be inspector or inspectors of licenses."

Sub-sec. 9. "For fixing and defining the duties, powers, and privileges of the inspector or inspectors so appointed; the remuneration he or they shall receive; and the security to be given for the efficient discharge of the duties of the office of inspector."

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It is said that the Local Legislature of the Province of Ontario had no authority to pass the last statute of 32 Vict. c. 32, or at all events the portions of the statute which authorized the municipality to pass by-laws to limit the number of tavern licenses to be granted, and to prohibit the granting of shop licenses.

If the Legislature of Ontario had no power to make these provisions in their statute, had they power to repeal those provisions in the Act of the Parliament of Canada? And if they had no power to repeal these sections they must now be in force, the 129th section of the B. N. A. Act directing that "all laws in force in Canada . . . at the union . . . shall continue . . . as if the union had not been made; subject . . . to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act."

Under the head of "Distribution of Legislative Powers," "Powers of the Parliament," by section 91 of the B. N. A. Act it is provided that "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, *in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces*; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parlia-

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ment of Canada extends to all matters coming within the classes of subjects next hereafter enumerated; that is to say" (amongst other things):

" 2. The regulation of trade and commerce."

" 3. The raising of money by any mode or system of taxation."

And under the head "Exclusive Powers of Provincial Legislatures: "

Section 92. "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereafter enumerated, that is to say" (amongst others):

" 8. Municipal institutions in the Province."

" 9. Shop, saloon, tavern, auctioneer, and other licenses in order to the raising of a revenue for Provincial, local, or municipal purposes."

" 13. Property and civil rights in the Province."

" 15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section."

" 16. Generally all matters of a merely local or private nature in the Province."

It is contended that the limiting the number of licenses to be granted to taverns in a municipality, or preventing the issue of shop licenses, is interfering with the exclusive right of the Legislature to pass laws for the regulation of commerce, and that the statute of the Ontario Legislature authorizing this to be done is *ultra vires*.

On the other hand, it is urged that the regulating of taverns, the limiting the number of licenses, and the dealing with the subject of the keeping and retailing of certain classes of articles must be in the nature of police matters, properly pertaining to the powers of municipali-

ties, and must be "matters of a merely local and private nature in the Province."

In January term, 1847, in the Supreme Court of the United States, judgments were pronounced in what are there styled the *License Cases* (1). The cases were argued by some of the most distinguished lawyers in the United States, including the late Daniel Webster.

The doctrine contended for by the parties who opposed the laws was, that though they authorized the commerce in wines and spirits in quantities not less than 28 gallons, they were repugnant to the constitution and laws of the United States: 1st. In the power to regulate foreign commerce. 2nd. In the power to collect revenue on imports into the several States. 3rd. In the equal apportionment of taxes and duties in all the States. 4th. In the power to make treaties.

The general course of the argument was, that no State had the right to prohibit the sale of merchandise by wholesale or retail, authorized by a valid law of Congress, or by treaties, to be imported into its markets, the retail sale being as indispensable to the object of importation—viz., use and consumption—as the wholesale. If a State can control, to the extent of prohibition, commerce in imported merchandise up to her boundaries or the instant it shall pass in bulk from the hands of the importer, she can thereby exclude foreign commerce, and deny her markets to foreign nations. The laws of Congress make no distinction between commerce in imported wines and spirits and other foreign merchandise. The recognition of the power of a State to exclude the first from its market whenever public sentiment requires it, must embrace the like power in respect to all other descriptions of imports whenever the public sentiment of a State demands its exercise. The point where regula-

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tion ceases and prohibition begins, is the point of collision and of unconstitutional operation of a State law affecting foreign commerce. In any and all cases the power to deny sale includes the power to prohibit importation; and the question of power is the same, whether exercised directly by the Legislature, or indirectly by its agents thereunto authorized. The operation of the law on foreign wines and spirits deprives imported articles of their vendible quality. The right to sell is connected with the payment of duties, and the right to sell must extend beyond the importer or it is an inoperative right. By treaty with France their wines are admitted to consumption in the markets of the United States. The law complained of shuts the markets of the State against the fair and just operation of those laws and treaties of the United States, and renders them so far inoperative.

The Act blends two powers to be exercised at pleasure under the statute—the one legitimate, to regulate; the other unconstitutional, to prohibit whenever the public sentiment of the State comes up to that point. If one State can exclude one or more articles of import, she pays so much less revenue than other States that admit all, and in this way the “duties are not uniform throughout the United States.” If a State shuts its markets against one or more articles admitted under a reciprocal treaty with a foreign nation by denying a sale of it, then the United States cannot, in good faith, perform its reciprocal engagements.

The line of argument in favour of the constitutionality of the law was after this sort:—The State has a right to provide for the health of its citizens by police regulations. A law restraining an indiscriminate traffic in wines and spirits, designed to protect life and health by promoting temperance and sobriety, is a police law. In

*Brown v. Maryland* (1) the Court observes that "the power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain with the States," and the removal or destruction of infectious or unsound articles is undoubtedly a branch of the same power. Harbour laws, ballast laws, etc., are of a similar character. They are sustained because they are police regulations of the States, and are not regulations of foreign commerce, though for the purpose of protecting health and property they necessarily deal with it, and such laws are not incompatible with or repugnant to foreign commerce. Police laws have in fact everywhere been maintained against the supreme power of the United States, notwithstanding this obvious interference. The design of the law is manifestly to prevent tippling and disorder, by promoting temperance and sobriety, and whether it be a regulation of trade or police, or both, relates to affairs completely internal. Is this a suitable matter to engage legislative attention? Does such a traffic demand restraint, or does the Legislature employ it as a pretext to regulate foreign commerce? Whether an applicant for a license is a suitable person, or whether the public good requires the grant to be made, are facts to be ascertained which must depend upon evidence, and the question cannot be decided without an exercise of judgment. It is difficult to comprehend how a selection of suitable persons or of suitable places can be made without the exercise of so much discretion as such a decision implies. Police laws may be carried to any extent which the public welfare demands. If the cargo of a vessel is infected and dangerous, it is destroyed, and all revenue and private interests are sacrificed for the public safety. Gunpowder is required to be landed and stored in a way which saves life

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and property from jeopardy. Ballast is required to be deposited where it does no mischief to navigation. The publication by sale or otherwise of obscene books, prints, pictures, etc., is an indictable offence. Yet such laws are undeniably constitutional, and are maintained as police regulations on the ground that the public health, morals, and property demand protection. The legal provision in that behalf must be such as to meet the emergency. If excessive indulgence in intoxicating drinks be an evil, it should be guarded against by wise and prudent regulations. If the evil be of such magnitude as to demand stringent provisions reaching to exclusion, there is no constitutional objection to such legislation.

The reasoning for the law, it was contended, established amongst others these propositions: that the traffic in wines and spirituous liquors has in the public judgment, as expressed through ages and centuries, demanded restraint and regulation; that if the right of a State to maintain police laws is complete and unqualified, there can be no constitutional conflict with the laws of the United States, as the power is absolute and supreme: See also 12 Wheaton, 549, 550, 571, as to admitted police powers. The license system was adopted in England at a very early period of her history, and has ever since composed a part of the police system of that kingdom: Crabbe's History of the English Law, 477. License regulations were adopted by the Provincial Legislature of New Hampshire: Provincial Laws of New Hampshire, ed. of 1761, pp. 64, 143.

In giving judgment, Chief Justice Taney stated, p. 573, that "The validity of each of them (the laws) has been drawn in question, upon the ground that it is repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several States."

And at p. 577: "These laws may, indeed, discourage imports and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

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Mr. Justice McLean, in his judgment, observes at p. 589: "A license to sell an article, foreign or domestic, as a merchant, or innkeeper, or victualler, is a matter of police and of revenue within the power of a State. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, with any power possessed by Congress."

And at p. 590: "The license system, as adopted in all the States, restrains persons from selling by retail who have not taken a license; and a license to retail spirits is granted by the Court, or some other body, at its discretion and on certain conditions. This is the character of the law under consideration. The applicant to obtain a license must be recommended by a majority of the selectmen of the town, as a person of good moral character. The necessity of a license presupposes a prohibition of the right to sell as to those who have no license. For if a State may require a license to sell, it may, in the exer-



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cise of a proper discretion, limit the number of such licenses as the public good may seem to require."

And at p. 591: "A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the State authority. The State may regulate the sale of foreign spirits, and such regulation is valid, though it reduces the quantity of spirits consumed."

And at p. 592: "In all matters of government, and especially of police, a wide discretion is necessary. It is not susceptible of an exact limitation, but must be exercised under the changing exigencies of society. In the progress of population, of wealth, and of civilization, new and vicious indulgences spring up, which require restraints that can only be imposed by the legislative power. . . . And if the foreign article be injurious to the health or morals of the community, a State may, in the exercise of that great and conservative police power which lies at the foundation of its prosperity, prohibit the sale of it. No one doubts this in relation to infected goods or licentious publications. Such a regulation must be made in good faith, and have for its sole object the preservation of the health or morals of society. If a foreign spirit should be imported containing deleterious ingredients, fatal to the health of those who use it, its sale may be prohibited."

Mr. Justice Catron, at p. 611, says: "I admit as inevitable, that if the State has the power of restraint by licenses to any extent, she has the discretionary power to judge of its limit, and may go to the length of prohibiting sales altogether, if such be her policy; and that if this Court cannot interfere in the case before us, so neither could we interfere in the extreme case of entire exclusion, except to protect imports belonging to foreign commerce as already defined."

Mr. Justice Woodbury said, at p. 621: "The leading

object of the license is to ensure the sales of spirit in quantities not likely to encourage intemperance, and at places and times, and by persons conducive to that end."

And at pp. 624, 625: "This local, territorial, and detailed legislation should vary in different States, and is better understood by each than by the general Government; and hence, as the colonies under an empire usually attend to all such local legislation within their limits, leaving only general outlines and rules to the parent country at home; as towns, cities, and corporations do it through by-laws for themselves, after the State Legislature lays down general principles; and as the war and navy departments, and courts of justice, make detailed rules under general laws, so here the States, not conflicting with any uniform and general regulations by Congress as to foreign commerce, must for convenience, if not necessity, from the very nature of the power, not be debarred from any legislation of a local and detailed character on matters connected with that commerce omitted by Congress."

In deciding that these laws were constitutional, several of the judges referred to the doctrine now well established in the United States, that the powers which were not delegated by the State Governments to that of the United States remained with the States, and contended that the power to license and regulate the sale of wines and spirituous liquors was one which was not surrendered in giving to Congress the right to regulate commerce.

Here, however, our Local Legislature, it is contended, only possesses the powers expressly granted to it, the more extended powers remaining with the Dominion Legislature. Admitting this to be so for the purpose of the present discussion, it by no means follows that the Local Legislature does not possess the power in this matter

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which would be necessary to sustain the two by-laws referred to.

We must assume, what is not probably at all doubted, that the Imperial Legislature, in passing the B. N. A. Act of 1867, introduced the various provisions as to the respective powers of the Local and Dominion Legislatures on the suggestion of, and on conference with, the delegates from the various Provinces, who had before that met to discuss the basis of the confederation.

As far as the Province of Upper Canada was concerned, the delegates who represented the views of that section of the United Province of Canada well knew what the municipal institutions of Upper Canada were, and some one of them had probably introduced and carried through the Legislature, only a short time before, the Act passed on the 15th August, 1866, entitled "An Act respecting the Municipal Institutions of Upper Canada," 29-30 Vict. c. 51. They knew that in the sections of that Act already referred to the power was granted to the municipalities in Upper Canada, under certain circumstances, to limit the number of taverns and to prohibit the licenses of shops for the sale of spirituous liquors in the several municipalities. When, then, this Imperial Act uses the very words of the title of this Bill in giving as one of the class of subjects on which the Provincial Legislature may pass laws, viz., "*Municipal Institutions in the Province*," can there be any reasonable doubt that it was expected and intended that the "municipal institutions" which were to be constituted under that authority would possess the same powers as those which were then in existence, under the same name, in the Province? I should think not.

I think we may properly hold that the powers now contended for were intended to be, and were, vested in the Provincial Legislature by these very words. Their

being followed by :—"9. Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of *a revenue* for Provincial, local, or municipal purposes," does not, in our opinion, shew it was the intention to limit the exercise of the powers which municipal institutions ought to have, and which they had had, of limiting the sale by retail in inns, or prohibiting the sale thereof in shops, but rather to remove all doubts as to their right to raise a revenue either for Provincial, local, or municipal purposes by the issuing of these and other licenses.

The B. N. A. Act of 1867 must have been passed on a conference with the delegates from the different Provinces, and the various provisions as to the powers and subjects of legislation by the Dominion and Local Parliaments must have been suggested by these delegates. Their suggestions must have been based on personal knowledge of the various modes in which legislation on those subjects had been had in the various Provinces before the Confederation, and if it had been intended that similar legislation should not have been continued as before by the various Provinces, there is no doubt that such intention would have been expressed in the Act.

And when words and expressions are imported into that Act which have been in common use in legislating for these Provinces, we must continue interpreting these words in the same manner and to mean the same thing as we decided they meant in statutes passed by our own Legislatures. It would create great difficulties and inconvenience if we did not act on this rule.

Under the 252nd section of the Municipal Act of 1866, it was declared that no tavern or shop license should be necessary for selling liquors in the original packages in which the same have been received from the importer or manufacturer, provided such packages contain respectively not less than five gallons or one dozen bottles.

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The shop, saloon, and tavern licenses, I think we may assume, were for the purpose of allowing the parties to sell by *retail*; and the prohibitory power, under the Municipal Act of 1866, was to prohibit the sale *by retail* —sec. 249, No. 9.

The reference to selling spirituous liquors *by retail* was made at a very early period, in relation to the sale of spirituous liquors in Canada. By the Imperial statute 14 Geo. III. c. 88, s. 5, a duty of £1 16s. for any license to any person for keeping a house or any other place of public entertainment, or for the *retailing* of wine, brandy, rum, or any other spirituous liquors, was imposed. And by the Provincial statute of U. C., 37 Geo. III. c. 12, s. 1, every *shopkeeper* who sells wine, brandy, rum, or other spirituous liquors in less quantity at any one time than three gallons, shall *be possessed* of a license for that purpose.

The Legislature of the Province of Canada, up to the time of the confederation of the Provinces, seems to have limited the granting of licenses *for the sale of wines and spirituous liquors* to shopkeepers, and to tavern and saloon keepers and the like, who sold *by retail*; and did not make it necessary for the importer or manufacturer to take out a license to sell when selling *by wholesale* which at first was limited to quantities not less than three gallons, and latterly to five gallons.

The legislation as to the excise on the manufacture of liquors, and the licensing of those engaged in that business, seems to have been kept separate from the legislation as to granting licenses to shopkeepers and tavern keepers.

We think, looking at the legislation by the Province of Ontario as applicable to the giving the powers of limiting the number of taverns in a municipality or prohibiting the sale *by retail* of spirituous liquors by shopkeepers

in such municipality, that this is a power which may be properly exercised by the Local Legislature as a matter chiefly of police, of a merely local and private nature, when it does not interfere with the sale of imported or manufactured liquors otherwise than as *by retail*.

We further think that the power may be exercised, looking at the nature of the legislation on the subject, under the power given to the Local Legislature to legislate exclusively, in relation to municipal institutions, and that the power to legislate as to shop and other licenses, in order to the raising of a revenue, does not limit such power, but was so placed there rather with a view of removing all doubts as to the rights of the Provincial Legislature to raise a revenue by those means.

In connection with this subject, and in reference generally to the discussion of constitutional questions, I will refer to the language of Chief Justice Marshall, when deciding such questions in the Supreme Court of the United States.

In *McCulloch v. The State of Maryland* (1), he said: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

And again, at pp. 409, 410: "The Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means,

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(1) 4 Wheaton, 316, 407.

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that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception."

And at p. 421: "We think the sound construction of the constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

In *Brown v. The State of Maryland* (1), the same distinguished judge uses the following language: "It has been truly said that the presumption is in favour of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality."

Mr. Justice Johnson, of the Supreme Court of the United States, in *Gibbons v. Ogden* (2), thus refers to commerce: "Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become objects of commercial regulation. Ship-building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity that the nation which could not legislate over these subjects would not possess power to regulate commerce."

We think the party who applies to quash these by-laws has failed to shew that the Legislature of the Prov-

ince of Ontario had not a right to pass the statute under which they were framed.

On the contrary, we think they have the power conferred on them to pass such by-laws by the reasonable and proper construction of the words of the B. N. A. Act, 1867.

We think the course of legislation in Canada previous to the passing of that Act shews that the granting of licenses to sell wines and ardent spirits *by retail* was a matter properly entrusted to the municipal institutions in this Province, and that the power to prohibit such sale under certain circumstances was also proper to be entrusted to those institutions ; that the power to legislate for such institutions necessarily carries with it the right to confer on such institutions all such powers, particularly of police, as could be most conveniently and with advantage to the community exercised by them, and when such matters may be said to be of a merely local and private nature in the Province, they cannot be said to interfere with the rights possessed by the Dominion Parliament.

We think the right to license brewers and distillers, and to impose duties of excise on their manufactures, is one that has never been conferred on municipalities in this country, and would not properly come within the power usually conferred upon municipal corporations. They have always been looked upon more as matters of a *quasi* national character than of the character pertaining to municipalities. The imposition of taxes on wines and spirits imported from abroad has also been treated and considered in the same way ; and in all our statutes of a prohibitory character, passed before confederation, the right of the importer and manufacturer to keep and sell wines and spirituous liquors by wholesale has been recognised and preserved.

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The rights of the manufacturers and importers are not interfered with improperly by a municipality limiting the number of houses to be licensed, or forbidding shops to be licensed within its territorial limits. This may be done by the municipalities, and importers and manufacturers still have the right to keep and sell by wholesale the articles of commerce which they have imported or made.

[The remainder of the judgment is omitted, the same not having reference to the present question.]

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ONTARIO COURT OF QUEEN'S BENCH.

REGINA v. RODDY.

[Reported 41 U. C. Q. B. 291.]

36 Vict. c. 10, s. 4, O.—What is “a crime”—Evidence.

An information under an Ontario Act, for selling intoxicating liquors on Sunday, was held to be so far a charge of a criminal character that the defendant could not be compelled to give evidence against himself.

Mr. G. H. Watson, on February 6th, 1877, obtained from Gwynne, J., a rule returnable before the full Court, calling on John Ritchie, license inspector for the west riding of the County of Peterborough, and David George Hatton, Esq., Police Magistrate in and for the town of Peterborough, to shew cause why a certain conviction made by the said David George Hatton, dated 4th December, 1876, whereby the defendant Robert Roddy was convicted of selling intoxicating liquors on Sunday, 5th of November, 1876, contrary to the statute in that behalf, should not be quashed, upon the ground that the said conviction was illegally obtained, in this, that the said Robert Roddy was called upon and compelled to give evidence against himself, notwithstanding his own objection and that of his counsel to be sworn or to give such evidence; and on the ground that section 4 of 36 Vict. c. 10, O., under which the Police Magistrate compelled the defendant to give evidence, is beyond the jurisdiction of the Legislature of Ontario to pass, and is unconstitutional.

The rule was obtained on reading a writ of *certiorari* and the return thereto, including the information, depositions, and conviction had and taken by and before the police magistrate of the town of Peterborough.

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The information, which was that of John Ritchie, license inspector, and dated 14th November, 1876, stated that he had good reason to believe and did verily believe that the defendant Roddy did, at his place of business in the town of Peterborough, on Sunday, the fifth day of November, 1876, dispose of intoxicating liquor contrary to the statute in that behalf.

There was no evidence against the defendant to sustain the charge except his own testimony. He objected to be sworn or to give evidence, but was compelled to do so, and under compulsion gave evidence which established the charge.

He was thereupon, on 4th December, 1876, convicted of the offence charged in the information, and adjudged as follows: "For his said offence to forfeit and pay the sum of twenty dollars, to be paid and applied according to law," and also "to pay to the said John Ritchie, the complainant, the sum of four dollars and fifty-five cents for his costs in this behalf; and if the said several sums be not paid forthwith, on or before the seventh day of December instant, I order that the same be levied by distress and sale of the goods and chattels of the said Robert Roddy; and in default of sufficient distress, I adjudge the said Robert Roddy to be imprisoned in the common gaol of the said county of Peterborough for the space of fourteen days at hard labour, unless the said several sums and all costs and charges of conveying the said Robert Roddy to such gaol shall be sooner paid."

Mr. *Grover* shewed cause. The conviction was had under 37 Vict. c. 32, s. 34, O. If it does not disclose a crime, the evidence was properly received under 36 Vict. c. 10, s. 4, O. The cases shew that it does not disclose a crime: *Russell on Crimes*, 9th ed., 88.

Mr. *Bethune*, Q.C., contra, Mr. *Watson* with him. The 36 Vict. c. 10, s. 4, is impliedly repealed by 37 Vict.

c. 32, O. Section 44 of the latter Act provides for a new procedure. It declares that the magistrate shall hear and determine in a summary manner according to the practice and procedure contained in Con. Stat. C. c. 103. And the latter Act contains no such provision as 36 Vict. c. 10, s. 4. If this be not so, it must be held that 36 Vict. c. 10, s. 4, is unconstitutional: *Attorney-General v. Radloff* (1), *Cattle v. Ireson* (2), *Re Lucas and McGlashan* (3).

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June 30. The judgment of the Court (Harrison, C. J., and Morrison and Wilson, JJ.,) was delivered by

HARRISON, C.J. :—

The conviction was made under 37 Vict. c. 32, ss. 28 and 34, O.

Section 28 provides that "In all places where intoxicating liquors are, or may be, sold by wholesale or retail, no sale or other disposal of the said liquors shall take place therein, or on the premises thereof, or out of or from the same, to any person or persons whomsoever from or after the hour of seven of the clock on Saturday night till six of the clock on Monday morning thereafter; . . . nor shall any such liquor be permitted or allowed to be drunk in any such places during the time prohibited by this Act for the sale of the same."

Section 34 provides "For punishment of offences against section 28 of this Act, a penalty for the first offence against the provisions thereof, of not less than \$20 with costs, or 15 days' imprisonment with *hard* labour, in case of conviction, shall be recoverable from, and leviable against, the goods and chattels of the person or persons who are the proprietors in occupancy, or tenants or agents in occupancy, of the said place or places, who shall be found by himself, herself, or themselves, or his,

(1) 10 Ex. 84.

(3) 29 U. C. Q. B. 81.

(2) E. B. & E. 91.

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her, or their servants or agents, to have contravened the enactment in the said twenty-eighth section or any part thereof; for the second offence a penalty . . . of not less than \$40 with costs, or 20 days imprisonment with *hard labour*; for a third offence, . . . a penalty of not less than \$100 with costs, or 50 days' imprisonment."

So far there is nothing expressed in this Act as to procedure or evidence, but reading further we find sections from 44 to 53, both inclusive, under the heading "Proceedings and Evidence."

Section 44 declares that "All prosecutions for the punishment of the several offences against the provisions of this Act, contained in sections numbered respectively 28, 29, 30, 35, and 36, whether the prosecution be for the recovery of a penalty or for punishment by imprisonment, shall take place . . . in cities and towns where there is a police magistrate, before the police magistrate," and he "shall have authority to hear and determine the same in a summary manner, according to the practice and procedure, and after forms contained in and appended to the Act, c. 103, of Con. Stat. C."

Section 44 [also] provides that "on such trials and proceedings the prosecutor or complainant shall be a competent witness."

Section 47 provides that "No person shall be rendered incompetent as a witness by reason of his being interested in any portion of the penalty sought to be recovered."

The Act, it will be observed, does not contain any provision that the accused shall be competent or compellable to give evidence against himself, nor does the Con. Stat. C. c. 103, contain any such provision.

Such a provision for the first time appears, and only appears, in 36 Vict. c. 10 s. 4, O., which declares that "On the trial of any proceeding, matter, or question, under any of the Acts of the Province of Ontario, relating

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to tavern or shop licenses, or under the Municipal Institutions Act of Ontario, or under the Assessment Act of Ontario, or under any other Act of the Legislative Assembly of the Province of Ontario, or on the trial of any proceeding, matter, or question, before any justice or justices of the peace, mayor, or police magistrate, in any matter cognizable by such justice, . . . *not being a crime*, the party opposing or defending, or the wife or husband of such person opposing or defending, shall be competent and compellable to give evidence in such proceeding, matter, or question."

The first question is, whether 86 Vict. c. 10 s. 4, O., is, as regards proceedings under the Tavern and Shop Licenses Act, repealed by 87 Vict. c. 32, O.

The latter Act recites that it is expedient to amend and consolidate the Acts 82 Vict. c. 82, O., 83 Vict. c. 83, O., and 86 Vict. c. 84, O., and repeals "the several Acts in the recital thereof" mentioned. It does not in any manner refer to or mention 86 Vict. c. 10, O. It repeals only the Acts mentioned in the recital. 86 Vict. c. 10, s. 4, O., is not one of them. There is no provision therein contained actually repugnant to 86 Vict. c. 10, s. 4, O. We are unable to decide that 86 Vict. c. 10, s. 4, O., is in any manner repealed or affected by 87 Vict. c. 32, O.

We are therefore forced to put a construction on sec. 4 of 86 Vict. c. 10, O.

The general policy of the law is, that no man can be compelled to criminate himself, *nemo tenetur se ipsum accusare*: Con. Stat. U.C. c. 82, s. 18; 83 Vict. c. 13, s. 5, sub-s. 4, O.; Taylor on Evidence, s. 1223; Powell's Principles of Evidence, 4th ed., 40; Paley on Summary Convictions, 5th ed., 109.

An individual charged with the commission of a criminal act cannot, conformably to the course of justice in our tribunals, be interrogated by the Court with

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a view to eliciting the truth, nor is he a competent witness in the case: *Broom's Legal Maxims*, 4th ed., 931.

We have no doubt that the words "not being a crime," as used in 36 Vict. c. 10, s. 4, O., apply to the whole section, for at least two reasons.

1. Because the Provincial Legislature have no direct power to legislate either as to crime or criminal procedure—B. N. A. Act, 1867, s. 91, sub-s. 27—and it cannot be intended that the Provincial Legislature assumed to do that which it had no power to do: See *Wilde v. Bowen* (1).

2. Because even if it had for any purpose the power, we cannot suppose that it was the intention of the Legislature, by the language used, to reverse a maxim of our law as settled, as important, and as wise as almost any other in it: See per Coleridge, J., in *Scott's case* (2).

While it may be held that the B. N. A. Act has conceded to the Provincial Legislatures the incidental power of enacting certain laws of a criminal character when necessary for the enforcement of laws properly passed by them on matters under their exclusive jurisdiction—see *Regina v. Boardman* (3)—it cannot be held that they have the power, directly or indirectly, of destroying the general rules of evidence appertaining to criminal procedure, or *quasi* criminal procedure throughout the Dominion.

What we mean is this—that while the Provincial Legislature has, under sub-s. 15, of s. 92 of the B. N. A. Act, the power to enact "The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section," the Provincial Legislature has no power in doing so to alter well understood rules of evidence made for the protection of persons substantially accused of crime.

(1) 37 U. C. Q. B. 504.

(2) *Deane & B.* 47, 61.

(3) 30 U. C. Q. B. 553; *ante*, p. 676.

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It follows that in every case coming under s. 4, of 36 Vict. c. 10, where it is attempted to compel a man to testify against himself, the enquiry must arise whether the charge against him is in substance a charge of crime.

This is the enquiry now raised before us, and from the decision of which we have no escape.

Whether a particular act is a crime or not must depend upon the nature and character of the act.

It is not in the power of the Provincial Legislature to declare an act which by the laws of the Dominion is a crime, not to be a crime, so as to make persons substantially accused of crime compellable to give evidence against themselves.

This, it appears to us, the Provincial Legislature, in the Act before us, has not attempted to do, but it may be said that short of such an attempt, such a provision as s. 4 of 36 Vict. c. 10, will be practically worthless; but the answer is, that if the attempt were made the provision would be of no greater value.

It will be well for the Provincial Legislature to consider whether, under the circumstances, the further retention in the statute book of such an embarrassing provision as 36 Vict. c. 10, s. 4, is expedient, but while we find it in the statute book we must expound it.

If the act with which defendant is charged under s. 28 of 37 Vict. c. 32, is, according to the well-understood principles of the laws of England, a crime, s. 4 of 36 Vict. c. 10, whatever it may mean, or whatever its operation, is inapplicable to this case; and as under colour of it the defendant was wrongfully compelled to testify against himself, the conviction obtained by such illegal means must be quashed.

The question what is a criminal proceeding, as the subject of summary conviction, in England, according to Paley on Summary Convictions, 5th ed., 112, 113,



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“depends on the manner in which the Legislature have treated the cause of complaint, and for this purpose the scope and object of the statute, as well as the language of its particular enactments, should be considered. It may be, as a general rule, that every proceeding before a magistrate where he has power to *convict*, in contradistinction to the power of making an order, is a criminal proceeding, whether the magistrate be authorized, in the first instance, to direct payment of a sum of money as a penalty, or at once to adjudge the defendant to be imprisoned; and it must be borne in mind, that where a statute orders, enjoins, or prohibits an act, every disobedience is punishable at common law by indictment; in such cases the addition of a penalty, to be recovered by summary conviction, can hardly prevent the proceeding in respect of the offence from being a criminal one.”

Any wilful contravention of any Act of the Dominion Parliament, which is not made an offence of some other kind, is a misdemeanor, and punishable accordingly: 31 Vict. c. 1, s. 6, sub-s. 20, D.

So any wilful contravention of any Act of the Legislature of any of the Provinces within Canada, which is not made an offence of some other kind, is also a misdemeanor, and punishable accordingly: 31 Vict. c. 71, s. 3, D.

Now, assuming the constitutionality of ss. 28 and 32 of 37 Vict. c. 32, the question is, whether it is not a crime, in the broad sense of that word, for a person authorized to sell spirituous liquor to make a sale thereof on Sunday, contrary to the provisions of that Act?

It is difficult to imagine a sale on Sunday which would not be a wilful one, but apart from this it is obvious, from a reading of the Act, that the offence is one against the public interest, and may be punished either by fine or imprisonment at *hard* labour.

"The proper definition of the word 'crime' is an offence for which the law awards punishment:" Per Littledale, J., in *Mann v. Owen* (1).

A crime or misdemeanor is an act omitted or committed in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms, though in common usage the word "crime" is made to denote such offences as are of a deeper and more atrocious dye, while smaller faults and omissions of less consequence are comprised under the general names of misdemeanors only: *Butt v. Conan* (2).

The difficulty is not so much to find definitions as to apply them. This difficulty has ever been felt both in England and in this country, as an examination of the cases will shew, whenever an effort has been made by the Courts to draw the line between civil and criminal procedure—between acts illegal which are not crimes, and illegal acts which are crimes.

In *Attorney-General v. Bowman* (3), an information against the defendant for keeping false weights was held by Eyre, C. B., not to disclose a crime, and the learned judge, being of that opinion, rejected general evidence as to character tendered on behalf of the defendant.

In *Huntley v. Luscombe* (4) it was made a question whether a commitment in execution for a penalty before a magistrate for an offence against the excise laws is a commitment for "a criminal matter" within the provisions of the *Habeas Corpus* Act.

In *Rex v. Myers* (5) it was held that a person who had been convicted in a penalty under the Lottery Act,

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(1) 9 B. &amp; C. 595, 602.

(2) 1 B. &amp; B. 548, 575.

(3) 2 B. &amp; P. 532 (note).

(4) 2 B. &amp; P. 530.

(5) 1 T. R. 265.

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22 Geo. III. c. 47, and arrested on a Sunday, and sent to the house of correction for want of a sufficient distress, was not a criminal, so that his arrest on Sunday was unlawful.

In *Re Eggington* (1) it was held that a town clerk dismissed from office, and convicted before two justices of the peace, under statute 5 and 6 Wm. IV. c. 76, s. 60, for wilfully refusing to deliver account books up after notice, was not a criminal, so that his arrest on Sunday was illegal.

In *Attorney-General v. Siddon* (2) it was made a question whether a trader concealing smuggled goods and subject to penalties under the Customs Acts, is to be held accused of crime, so as to be free of the misconduct of his servant, and liable only for personal guilt.

In *Easton's Case* (3) it was held that a person sentenced by two justices to imprisonment with hard labour, under the Smuggling Act, 4 and 5 Wm. IV. c. 18, s. 2, was in execution for criminal matter under the *Habeas Corpus* Act, Lord Denman saying "the party is sentenced to imprisonment at *hard labour*, which puts the point beyond doubt."

In *Attorney-General v. Radloff* (4) the Court, consisting of four judges, was equally divided on the question whether the trial of an information filed by the Attorney-General for the recovery of penalties for smuggling under ss. 46 and 82 of 8 and 9 Vict. c. 87, was a civil or criminal proceeding. Contradictory opinions as to what acts are or are not crimes were given by the learned judges, but as the case decides nothing we forbear to quote them.

In *Re Lucas and McGlashan* (5) this Court held that a

(1) 2 E. & B. 717.

(2) 1 Cr. & J. 220.

(3) 12 A. & E. 645.

(4) 10 Ex. 84.

(5) 29 U. C. Q. B. 81

conviction under the Inland Revenue Act, 81 Vict. c. 8, s. 190, for possessing a distilling apparatus without having made a return thereof, was a conviction for a crime.

In *Taylor's Case* (1) it was held under the *Habeas Corpus* Act that a person committed for contempt of court was committed for "criminal or supposed criminal matter."

In *Cobbett v. Slowman* (2) it was held that a person in custody under a commission of rebellion issued out of equity is not in custody for any criminal or supposed criminal matter within the meaning of the *Habeas Corpus* Act.

In *Cattell v. Ireson* (3) it was held that a person convicted by justices under 1 and 2 Wm. IV. c. 82, s. 23, for using an engine for the purpose of taking game without the authority of a certificate, was a criminal proceeding within the meaning of s. 3 of Lord Denman's Act, 14 and 15 Vict. c. 99, so that the party charged was neither competent nor compellable to give evidence against himself.

In *Parker v. Green* (4) a proceeding before justices preferred under 9 Geo. IV. c. 61, against a person licensed to sell excisable liquors by retail, for "that he did unlawfully and knowingly permit and suffer persons of notoriously bad character to assemble and meet together in his house and premises," was held to disclose a charge of crime, and that the defendant was not a competent witness.

Crompton, J., in delivering judgment said, p. 811: "When a proceeding is treated by a statute as imposing a penalty for an offence against the public, the amount of which penalty is to be meted by the justices according to the magnitude of the offence, there can be no doubt

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(1) 3 East 232.  
(2) 9 Ex. 633.

(3) E. B. & E. 91.  
(4) 2 B. & S. 299.

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the proceeding is a criminal one." And Wightman, J., said, p. 309: "The justices may punish such offender by fine, thus treating fine as a punishment for offence against good order and rule."

The latter decision was followed in *Regina v. Sullivan* (1), where the charge was "for keeping a dog without a license, contrary to the Dogs' Regulation (Ireland) Act, 1865." Palles, G. B., said, p. 407: "The penalty is imposed by way of punishment, and not as compensation to any particular individual."

In *Sweeny v. Spooner* (2), where the information was under 5 Geo. IV. c. 88, s. 4, charging the defendant with running away from the parish of B., whereby his wife became chargeable to the parish, it was made a question whether the charge was not so far of a criminal nature as to render the wife's evidence inadmissible against him. And in *Reere v. Wood* (3), where under s. 3 of the same statute the charge was against a person for neglect to maintain his wife and children, the wife of the accused was excluded as a witness.

In *Bluck v. Rackham* (4), it was held that a proceeding under 1 and 2 Vict. c. 106, s. 32, against a beneficed clergyman for penalties for non-residence on his benefice, was a civil and not a criminal proceeding. Such was also the decision in *Rackham v. Bluck* (5).

In *Burder v. O'Neill* (6), where the suit was against a clergyman under the Church Discipline Act for immorality, it was held that the clergyman was not either a competent or compellable witness, but in the *Bishop of Norwich v. Pearse* (7) the contrary was held.

In *The Queen v. Steel* (8) it was held that an order for costs made on the trial of a criminal information is

(1) L. R. 8 Ir. C. L. 404.

(2) 3 B. & S. 329.

(3) 5 B. & S. 364.

(4) 5 Moore P. C. C. 305.

(5) 9 Q. B. 691.

(6) 9 Jur. N. S. 1109.

(7) L. R. 2 Ad. & E. 281.

(8) 2 Q. B. D. 37.

criminal procedure, so that under the Judicature Acts of 1873 and 1875 there could be no appeal from it.

In *The Queen v. Fletcher* (1) it was held that a rule for a *certiorari* to bring up a summary conviction by justices, for the purpose of quashing it on the ground of want of jurisdiction, was in substance as well as in form criminal procedure, so that there could be no appeal under the Judicature Acts.

The conclusion which we draw from these decisions is, that the accusation against the defendant here was so far of a criminal nature that he ought not to have been compelled to give evidence against himself, and therefore that the conviction must be quashed.

Although it is not possible to reconcile the decisions, it would seem that where the proceeding, although before justices of the peace, is not simply for the recovery of money payable to some individual informant, but for the punishment of an offence against social order, and where the punishment may be not only the imposition of a fine but imprisonment, and that at hard labour, the offence, by whichever Legislature created or assumed to be created, is to be looked upon as a crime, and the prosecution a criminal prosecution, so as to exclude the testimony of the accused, either for or against himself.

*Rule absolute.*

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(1 2 Q. B. D. 43.

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Dec. 1.

REGINA v. GEORGE ARCHIBALD AMER AND LABAN AMER.

[Reported 42 U. C. Q. B. 391.]

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Feb. 4.

*Prerogative of the Crown—B. N. A. Act, ss. 12, 65, 91, 92, 96—Provisional District of Algoma—Commission of Oyer and Terminer to District Judge—Power to issue.*

The provisions of the B. N. A. Act have not superseded the prerogative right of the Crown to issue a commission to the Judge of the Provisional Judicial District of Algoma to hold a Court of Oyer and Terminer and General Gaol Delivery, for trial of felonies, etc.—and such a commission by the Deputy of the Governor-General was held to be legal.

Per Wilson, J., the Lieutenant-Governor of Ontario, as well as the Governor-General, has the power to issue commissions to hold Courts of Assize.

Criminal Case stated under Con. Stat. U.C. c. 112.

The prisoners were tried at a special Court of Oyer and Terminer and General Gaol Delivery, in and for the provisional district of Algoma, on the 2nd October, 1877, at Sault Ste. Marie, in the provisional district of Algoma, before the Hon. Walter McCrea, judge of the provisional judicial district, for murder, on two several indictments. The one was for the murder of William Bryan, the other for the murder of Charles Bryan.

On the first of these indictments George Archibald Amer was found guilty of manslaughter, and Laban Amer was found not guilty.

On the second of these indictments the two prisoners were found guilty of murder.

The counsel for the prisoners objected to the passing of judgment upon them—1. Because neither the authorities of the Dominion, nor of the Province of Ontario,

had power to issue a commission to the said Walter McCrea as a judge of a Court of Oyer and Terminer and General Gaol Delivery under Con. Stat. U.C. c. 11, as he was not one of the several classes of persons named in section 2 of that statute, because Con. Stat. U.C. c. 128, s. 94, respecting unorganized tracts, gave him the same power and jurisdiction as County Court judges have, but for the purposes of such Courts only, and did not render him eligible for any appointment beyond that as judge of the said District Court.

2. That the authorities of Ontario had no power to appoint a judge, and the commission which was issued by them was void; and the authorities of the Dominion had no power to constitute a Court except by Act of Parliament, and there was no such Act constituting the Court, and their commission was also void.

The learned judge held the Court under two commissions, one issued by the Lieutenant-Governor of Ontario, dated 11th September, 1877, and the other by the Deputy-Governor of the Dominion, dated 22nd September, 1877. The commissions were addressed by name to the several Chief Justices and Judges of the Queen's Bench and Common Pleas, and to "the Honourable Walter McCrea, Judge of the Provisional District of Algoma, in the Province of Ontario."

The commissions followed in form that given in 4 Chitty's Criminal Law, 2nd ed., 134, and authorized the holding of a Court of Oyer and Terminer and General Gaol Delivery.

Mr. Hardy, Q.C., for the Crown.

The Con. Stat. U.C. c. 11, s. 6, authorizes special commissions of Oyer and Terminer, or of Gaol Delivery, for the trial of offenders whenever deemed expedient. Chapter 128, s. 98, of the Con. Stat. U.C., authorizes the

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Governor, during the continuance of any provisional judicial district, to issue the necessary commissions authorizing the holding therein of such Courts of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery; and section 2 of the first of these Acts does not restrain the generality of the other sections which are referred to. Besides, if c. 11 relates only to counties, c. 128 relates expressly to such a place as Algoma, and by it a commission may be issued, as before mentioned, and it need not be directed to any particular class of persons. It is also said that Mr. McCrea is not a *County* Court judge, so as to be within c. 11, s. 2. He is a provisional judicial District Judge, "with the powers, duties and emoluments of a County Judge in Upper Canada." But that does not shew that the commission might not lawfully be directed to him: *Reg. v. Sullivan* (1). (Harrison, C. J.—There is also the case of *Van Slyke v. Trempealeau County Farmers' Mutual Fire Ins. Co.* (2).) It was said Mr. McCrea's judicial power was restricted to proceedings in the Courts of Quarter Sessions of the Peace, in the Courts of his judicial district, corresponding with the County Courts in counties, and in Division Courts, and that the judicial district was to be deemed and held to be a county for these purposes: sec. 96. That argument does not touch the question. It is not correct to say that either commission has created a Court. The Court was and is in effect created by section 93, already referred to, and the commission has merely appointed the time and place and persons for holding the Court. The following commissions have at different times issued to that district:—May 27th, 1865, to John Prince, who was then judge of the said district, and who had been a Queen's Counsel before that, and was so then. October 15th, 1869, to the same person. December 22nd,

(1) 15 U. C. Q. B. 198.

(2) 20 Am. 50.

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1871, to Mr. McCrea, then the judge of the said district. He had never been a Queen's Counsel. April 30th, 1875, to the same person. If the power of issuing such commissions existed, and was exercised before Confederation, there is nothing which has taken away such power. The power must rest then either with the Dominion or with the Provincial authorities. There can be no objection raised here, because a commission has issued from each of such authorities: Chitty on Prerogatives, 77; 1 Chitty's Crim. Law, 2nd ed., 142 *et seq.*; 4 Bl. Com. 3rd ed., 310; 2 Hale's P.C. 29 *et seq.*; Hawkins' P.C., book ii. c. 5; 4 Inst. c. 28. The commissions in such cases may issue by prerogative: Chitty on Prerogatives, 34; Forsyth's Constitutional Law, 167 *et seq.*; The Governor-General's Instructions, Sess. Papers of 1867-8, No. 22, Article 3. As to the construction of the statutes, he referred to Dwaris on Statutes, 2nd ed., 504, 523, 532, 604; Hawkins, P.C., 8th ed., book ii., c. 25, p. 290, note 2; *Attorney-General v. Newman* (1).

Mr. M. C. Cameron, Q.C., contra.

There is a distinction between general and special commissions. The latter are for special times or special purposes. Although Con. Stat. U. C. c. 11, s. 2, says that the commissions *may* also contain the names of County Court judges and Queen's Counsel, besides those of the judges of the Superior Courts of common law, yet from the general terms of the enactment it is restrictive, and the commission can be directed only to such persons. As c. 128, s. 98, names no person to whom the commission is to be directed, it must therefore be directed to such persons as by law may be appointed to perform such duties. By section 94 the judge of the district is not made a judge of a County Court although he has

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the powers of such a judge, and he is not within the terms of section 97. In England the judge or serjeant presiding must be one of the quorum: 4 Bl. Com., 3rd ed., 310; Hawkins, P.C., book ii., c. 1; Harris's Crim. Law, 290. By the Confederation Act, Provinces create the Courts and the Dominion appoint the judges: ss. 12, 65; s. 91, sub-s. 27; s. 92, sub-s. 14. If such a commission could not issue before confederation, it cannot issue now. (Harrison, C. J., referred to the *Marshalsea Case* (1).) Mr. McCrea not being within the terms of c. 11, s. 2, had no authority to act as judge on the trial.

WILSON, J. :—

The authorities shew that the Crown has by prerogative the right to establish Courts for the administration of justice according to the general law of the land, and may issue special commissions for doing justice according to law: *Chitty on Prerog.* 77; 4 Bl. Com. 17th ed., 310; 1 *Chitty's Crim. Law*, 2nd ed., 151.

It appears also to be quite settled that the Governor of a colony may by commission conferring upon him the authority to create a Court and to establish judges, do these acts under that authority: *Forsyth's Opinions on Constitutional Law*, 167 to 174.

I conceive the prerogative of the Crown to constitute a new Court, or to issue a commission to such duly constituted persons as the Governor (if his commission extend that far), to take and hold any criminal Court such as is now in question, has not been superseded by any legislative authority which has been granted to us.

In the commission which was granted to Lord Monck as Governor-General, as referred to by Mr. *Hardy*, there is express power conferred to exercise authority in cases requisite as to the appointment of commissioners of Oyer

and Terminer, and other necessary officers and ministers for the better administration of justice and putting the law into execution.

The jurisdiction of the Superior Courts of law in England to issue a writ of *habeas corpus* to this country, was held not to have been taken away by the creation of an independent Legislature in Canada: *Ex parte Anderson* (1).

It was said in *Reg. v. Bertrand* (2), "It seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a charter or statute, the authority has not been parted with, it is the inherent prerogative right, and, on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally."

These cases shew the power and right of the Crown in such cases.

These commissions now before us are general in their terms. They are not confined to the trial of any particular persons, or of any particular crimes, but are expressed in the language of the ordinary commissions which are issued at the appointed times for holding such Courts.

It appears commissions do not go to this judicial district at the usual stated times at which they go to the organized parts of the country.

These commissions were issued for the holding of the Courts between Trinity and Michaelmas Terms in the same period in which the ordinary Courts of that nature throughout the other parts of the Province are held.

Are these then general or special commissions?

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(1) 3 E. & E. 487.

(2) L.R. 1 P.C. 520, 530.

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In 4 Bl. Com., 17th ed., 811, it is said: "Sometimes, also, upon urgent occasions, the Crown issues a special or extraordinary commission of Oyer and Terminer and Gaol Delivery, confined to those offences which stand in need of immediate enquiry and punishment, upon which the course of proceeding is much the same as upon general and ordinary commissions."

In Chitty on Prerog., 77, it is said: "So the King may issue special commissions for doing justice according to law, in extraordinary cases requiring speedy remedy and animadversion; though in ordinary cases commissions of Oyer and Terminer can be granted only to the justices of either bench or to the justices in Eyre," referring to 13 Edw. I., st. 1, cc. 29, 80; 1 Wood, 97. Lord Coke says: "Commissions of Oyer and Terminer are of three sorts: one general, at the suit of the King, as to hear and determine all manner of treasons, felonies, riots, trespasses," etc.; "another particular, at the suit of the party, and that in two sorts, one naming particularly the party grieved. . . *Ex gravi querelâ D. accepimus*; . . and the other is more general and of this form: . . *Ex clamoris querimoniis diversorum hominum*. . . The third is as well at the suit of the King as of the party, all in one writ or commission:" 2 Inst. 419. See also *F. N. B.* 110 *et seq.*

Again, in 4 Inst. 162, it is said: "Of commissions of Oyer and Terminer there be two sorts—one general, so called because it is general in respect of the persons, the offences, and the places where the offences are committed."

And at p. 168, "Particular commissions of Oyer and Terminer, so called in respect of the persons, of the offences, or of the places, whereof you shall find five precedents in the register."

The register referred to is *F. N. B.* 110 *et seq.*, before mentioned.

In 1 Chitty's Crim. Law, 2nd ed., 150, it is said: "Sometimes, also, upon urgent occasions, the King issues a special or extraordinary commission of Oyer and Terminer and Gaol Delivery, confined to those offences which stand in need of immediate enquiry and punishment, and not founded upon any particular Act of Parliament, but on the general prerogative of the King to grant them." See also Hawkins, book ii. c. 5, ss. 24 to 32 inclusive.

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According to these opinions, and leaving out of consideration at present the place in which the commissions were to be executed, the commissions are general and not special. They have not been issued upon any special urgency, or for any extraordinary case requiring speedy animadversion.

In England the practice seems to be as follows:—

In 4 Blackstone's Com., 17th ed., 270, it is said the commission of Oyer and Terminer "is directed to the judges and several others, or any two of them; but the judges, Queen's Counsel, and barristers having patents of precedence, or serjeants at law only are of the quorum, so that the rest cannot act without the presence of one of them."

In Chitty on Prerogatives, 77, it is said: "though in ordinary cases, commissions of Oyer and Terminer can be granted only to the justices of either Bench, or to the justices in Eyre."

In 2 Chitty's Crim. Law, 143, it is said: "The commission of Oyer and Terminer is under the great seal directed to the Chancellor, President of the Council, Lord President of the Council, Lord Privy Seal, several noblemen, two Judges of the Courts at Westminster, King's Counsel, Serjeants, and Associates; but the judges, serjeants-at-law, and King's Counsel therein mentioned are to be of the quorum, so that the rest cannot act without the presence of one of them."

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In p. 145 it is said: "The commission of General Gaol Delivery is directed only to the judges themselves, the serjeants, the King's Counsel, and the Clerks of Assize and Associate."

It is said in Com. Dig. Justices, G. 2, "The justices of Oyer and Terminer shall be justices of the one bench or the other, or justices errant by 2 Edw. III. c. 2;" and in H. it is said by the 4 Edw. III. c. 2, "Good and discreet persons shall be assigned to deliver gaols thrice a year, or oftener if need be."

In 2 Westm. c. 29, it is enacted that "a writ of trespass (*ad audiendum et terminandum*) from henceforth shall not be granted before any justices, except justices of either bench, and justices in Eyre, unless it be for an heinous trespass, where it is necessary to provide speedy remedy, and our Lord the King, of his special grace, hath thought it good to be granted:" 2 Inst. 418.

"Transgression here is taken in a large sense for any outrage or misdemeanor:" p. 419.

The 2 Edw. III. c. 2, provides that "the Oyers and Terminers shall not be granted, but before justices of the one bench or the other, or the justices errants, and that for great hurt or horrible trespasses, and of the King's special grace, after the form of the statute thereof ordained in time of the said grandfather and none otherwise."

Hawkins, Book ii. c. 5, s. 37, contends that neither 2 Westm. c. 29, nor the 2 Edw. III. c. 2, refers to general commissions, but only "to special commissions of Oyer and Terminer, granted at the complaint of particular persons, upon some great injury suggested to have been done to them," because these Acts, and the 34 Edw. III. c. 1, to which he refers, speak of *writs* and not of commissions of Oyer and Terminer, and the term *writs* applies more properly "for redressing of a particular

grievance at the suit of the party," and "because there may be a mischief to the subject from such special commissions which cannot be feared from general ones; for the party who sues out such a special commission may thereupon take out a writ to the sheriff, commanding him to arrest the goods supposed to be wrongfully taken away, and to keep them in safe custody till some order be made concerning them by the justices assigned to determine the matter, which may be very inconvenient to the person complained of. Neither can it be imagined that the statute intended to restrain general commissions to enormous trespasses, which could not but hinder the due execution of justice, which requires the punishment of all kinds of misdemeanors. But it is reasonable, indeed, that such special commissions should not be granted but upon urgent occasions; and accordingly we find precedents for the superseding of them, where the King has been informed that he was imposed upon in granting them on a suggestion that the injury complained of was of a heinous nature, when in truth it was but a slight, inconsiderable trespass."

The argument of Hawkins is that these statutes relate only to *special* commissions "granted at the complaint of particular persons upon some great injury suggested to have been done to them," and not to general commissions, nor to what are now called special commissions, issued at the instance of the Crown on an extraordinary or very urgent occasion.

It appears to me that the reasoning referred to is very strong to support the argument maintained, and that the object and purport of the statutes tend greatly to confirm the opinion which Hawkins has expressed.

But while the later writers state the law to be different, I would not feel it safe in a capital case to vary from the law and practice so adopted, if the English law were to govern in this case.

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But we have to consider here our own legislation on the subject, and especially Con. Stat. U. C. c. 128, relating to the unorganized tracts of the Province.

That statute, as already mentioned, provides expressly for the issue of such commissions into provisional judicial districts, but it is not said to whom they shall be directed.

The Act provides a special system of administration of justice in such a district. These are to be "temporary judicial districts," and afterwards, if necessary, "provisional judicial districts," into which, as a matter *ex abundanti*, it is provided the Queen's writs shall run from the Courts of law and equity of Ontario: s. 88.

The fact that the persons to whom such commissions shall be directed in such unorganized districts are not named or limited, is an argument that the general prerogative was not to be interfered with in issuing such commissions.

It may well be that it was necessary to provide a "speedy remedy" according to the 2 Westm. c. 29, or for "the place," 4 Inst. 63, by the issue of these commissions, and it may well be argued that the unorganized tract with a special provisional judicial district only, is a place where it was necessary for the due administration of justice that a special commission should issue in the general form to such person or persons as Her Majesty thought fit to appoint for the occasion.

I am of opinion the Crown could issue a commission of the kind to this provisional judicial district by prerogative right and power to the persons therein named, and could constitute Mr. McCrea, the judge of the district, one of the quorum; or I should rather say, as all who are named are of the quorum, one of the number who, equally with the others, might hold such Courts.

But independently of the prerogative right, I am very

much inclined to think that Mr. McCrea, as the judge of the provisional district, having by s. 94 of c. 128, "the same powers and duties as a County judge in Upper Canada," might have been appointed under c. 11, s. 2, in like manner as a County judge, to act as commissioner.

He is not a *County* judge, but a *District* judge: s. 97. He possesses the like powers which a County judge does. He holds a County Court, presides at the Sessions of the Peace, and holds Division Courts, and may exercise all powers under the Insolvent law which a County judge can do. He is in effect a County judge in all but name. And therefore it is, I think, having "the same powers and duties as a County judge," he may even under c. 11 be nominated to hold the Courts under the commissions in question in like manner as a County judge might be nominated.

There is another view of the case to be considered. These commissions consist of two parts: Firstly, of that part relating to the holding of a Court of Oyer and Terminer; and secondly, of that part relating to the holding of a Court of General Gaol Delivery.

In Com. Dig. Justices, H. 2, it is said that by 4 Edw. III. c. 2, "discreet persons" are to hold the Court of General Gaol Delivery.

I am not aware of any other legislation on that subject before the creation of our own constitutional powers.

But for the enactments of the Legislature restraining the exercise of the power of the Crown in such cases, Her Majesty might appoint by such commissions any one "to whom she will at her pleasure:" 2 Inst. 420.

It is also well settled that the same persons having the different commissions of Oyer and Terminer, and of General Gaol Delivery and of the Peace, may proceed

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by any one of them where they have no jurisdiction by another : 1 Chitty's Crim. Law, 142 ; 2 Hale's P. C. 34 ; Hawkins, bk. ii. c. 5, s. 21.

If Mr. McCrea could not act under the commission of Oyer and Terminer, I see no reason why he might not act under the other part of the commission relating to the gaol delivery.

I may therefore say that the commissions are, I think, valid under Con. Stat. U. C. c. 128, by the prerogative right and power of the Crown to issue them in the course of the due administration of justice in that provisional judicial district.

I think, also, they are valid under Con. Stat. U. C. c. 11, as rightly directed to Mr. McCrea as one of the commissioners, because he is in effect in all but name a County judge, and he has "the same powers and duties as a County judge."

I do not say because the judge of the said district has the same powers and duties as a judge of the County Court, that he is a County judge, or that it would be proper to describe him as one.

The meaning of it is, that he may exercise these powers and duties by his own title and designation of such district judge.

Although justices of the peace have a clause in their commission *ad audiendum et terminandum* felonies, etc., yet they come not under the name of justices of Oyer and Terminer within those Acts of Parliament that mention justices of Oyer and Terminer : 2 Hale's P. C. 23.

Because there was a commission of Oyer and Terminer known distinctly by that name, and the commission of the peace known distinctly by another name : 9 Co. 118 b. ; 3 Inst. 103 ; and because that designation applies to those who have general commissions, and not to them who have but a special commission only as

justices of the peace have: Wilson's Case, Cro. Eliz. 601.

I think it cannot be said that either commission established Courts of Oyer and Terminer and General Gaol Delivery. These Courts were already established in and throughout the Province, and all that these commissions have done was to nominate persons to take and hold such Courts.

If that be so, and I think there is no doubt of it, the commission issued at Ottawa was not an excess of power, even if it created a judge or judges, for the Governor-General does possess such a power.

There has manifestly been a fear of there being an imperfect exercise of power by the issue of a commission from only one of the two powers, and therefore it is that the Ottawa as well as the Ontario authority has each issued a commission.

The Legislature of Ontario, by the B. N. A. Act of 1867, s. 92, sub-s. 14, has the exclusive power to make laws in relation to "the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial courts, both of civil and criminal jurisdiction." But there has been no legislation by Ontario declaring that the Lieutenant-Governor may issue commissions for holding Courts of Assize, etc.

By s. 65 of the same Act, however, the power and authority to issue such commissions were vested in and exercisable by the Lieutenant-Governor of Upper Canada before the legislative union of Upper and Lower Canada, and were vested in and exercisable by the Governor-General after that legislative union up to the time of the Dominion Act taking effect, and such power and authority were, at the taking effect of the last named Act, capable of being exercised after that Act in relation to the Government of Ontario, and therefore they vested in

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and were to be exercised by the Lieutenant-Governor of Ontario after the taking effect of that Act.

It would seem, therefore, there can be little doubt that the Lieutenant-Governor of Ontario has the power and authority to issue commissions to hold Courts of Assize, etc.

That which probably raises a doubt of such power being vested in the Lieutenant-Governor is, that s. 12 of the Act is worded in almost the same manner, with respect to the powers and authorities of the Governor-General, as s. 65 is worded with respect to the power and authorities of the Lieutenant-Governor.

It would appear, therefore, that they can each issue commissions of this nature.

Sec. 96 of the Act, which empowers the Governor-General to appoint the judges of the Superior, District and County Courts in each Province, does not apply in terms to commissioners who are to act as judges of the Courts of Assize, etc; so that his power to appoint such persons must be exercised under s. 12, above mentioned.

I agree, therefore, in the way in which the questions have been answered by the Chief Justice.

HARRISON, C. J.:—

Although, under our system of government, the monarch has long since ceased personally to act as a judge, the administration of criminal justice still, to a great extent, pertains to the prerogative of the Crown.

The monarch may, by virtue of this prerogative, except so far as restrained by Act of Parliament, constitute what number of Courts and in what places she pleases: Chalmers' Opinions, 195, 484, 542, 544.

The issue of commissions of Oyer and Terminer and General Gaol Delivery, both general and special, still

proceed from the Crown, subject only to such restraint as the Legislature may have imposed on the exercise of the prerogative.

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While the ordinary or general commissions must be issued only "to the justices of either bench or the justices in Eyre," this limitation does not appear to extend to special commissions, or commissions in whatever form issued for doing justice according to law on extraordinary occasions."—*See Chitty on Prerog.* 77; *Hawkins' P. C.* bk. ii. c. 5, s. 24 to ss. 32, 34, 37 inclusive; 2 *Hale's P. C.* 22.

The issue of such a commission to some place where none of the ordinary justices of the Superior Courts of law could be either found or expected to be found must, in the absence of legislative prohibition, still rest on royal prerogative.—*See 1 Chitty's Crim. Law*, 149; 4 *Bl. Com.* 8rd ed. 310.

Governors of colonies are in general invested with this royal authority. *Prima facie*, their acts on behalf of the Sovereign are good. And unless their acts on behalf of the Sovereign are contrary to the law of the land where exercised, the Sovereign alone can disallow them.—*See Chitty on Prerog.* 34; *Chalmers' Opinions*, 238, 300, 484; *Forsyth*, 167.

The prerogatives of the Crown are not to be deemed as abridged or restricted by mere general words of legislation. The language must be express and free from ambiguity. If the language used be consistent with the existence of the prerogative, it must be held that the prerogative is not affected.

It is to be presumed that the Legislature does not intend to deprive the Crown of any prerogative unless it expresses its intention to do so in explicit terms or makes the inference irresistible: *Willton v. Berkley* (1); *Rea*

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v. *Cook* (1); *Attorney-General v. Newman* (2); *Reg. v. Bertrand* (3); *Reg. v. Davidson* (4); *Maxwell on Interpretation of Statutes*, 112, 118.

The Legislature of the former Province of Upper Canada and of the late Province of Canada, while making provision for the issue of ordinary commissions of Oyer and Terminer and General Gaol Delivery, were most careful not to be understood as interfering with the prerogative of the Crown as to the issue of special commissions on extraordinary occasions.

The declaration in the Act of 1822 is, "that nothing herein contained shall prevent, or be construed to prevent, the Governor, Lieutenant-Governor, or person administering the Government of this Province, from issuing a special commission or commissions for the trial of one or more offender or offenders upon extraordinary occasions, when he shall deem it requisite or expedient that such commissions should issue:" 2 Geo. IV. c. 1, s. 28.

Similar cautious language was used in the Act of 1887, 7 Wm. IV. c. 1, s. 8; the Act of 1856, 19 Vict. c. 48, s. 152; and the Act of 1857, 20 Vict. c. 57, s. 30.

These Acts are the origin of s. 6 of Con. Stat. U. C. c. 11, to which reference was made on the argument.

The only one of these Acts which, prior to the union of the Provinces of Upper and Lower Canada, made any allusion to the issue of ordinary commissions for new or outlying districts, was 7 Wm. IV. c. 1, s. 8, which contained these words: "Nothing contained in this Act shall render it necessary to hold any court in any new district of this Province lately organized, or hereafter to be organized, at an earlier period than is or may be provided in the Act erecting such new district."

(1) 3 T. R. 519, 521.

(2) 1 Price, 438.

(3) L. R. 1 P. C. 520.

(4) 21 U. C. Q. B. 41.

In the Act which was passed after the union of the Provinces of Upper and Lower Canada, 16 Vict. c. 176, making better provision for the administration of justice in the unorganized tracts of country in Upper Canada, there is a similar provision. It is as follows: "It shall be lawful for the Governor of this Province from time to time, and at all times hereafter, during the continuance of any such provisional judicial district or provisional judicial districts, whenever it may be deemed advisable and expedient to do so, to issue the necessary commissions authorizing the holding of Courts of Assize and Nisi Prius, Oyer and Terminer, and General Gaol Delivery, in any such provisional judicial district, or provisional judicial districts so formed as aforesaid:" s.2.

This enactment is the origin of s. 98 of Con. Stat. U. C. c. 128, to which reference was also made on the argument.

While some portions of the Con. Stat. U. C. c. 11, appear to apply only to the settled parts of the Province where there is a complete organization of counties, the whole of Con. Stat. U. C. c. 128, applies to what are called or known as "the unorganized tracts."

And while the former expressly affirms the right of the Governor to issue special commissions of Oyer and Terminer, or of Gaol Delivery, for the trial of offenders whenever he deems it expedient, the latter in no manner prohibits or interferes with the exercise of that prerogative.

The only conclusion to be drawn from these premises is, that the prerogative as to the issue of special commissions of Oyer and Terminer, and General Gaol Delivery, exists in all its integrity in the case of what are now known as the unorganized tracts or provisional judicial districts.

If in this case exercised by the proper colonial authority, it has certainly been wisely exercised by including in the commission, as one of the quorum, the

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judge of the provisional district of Algoma, who by statute has all the powers in that district possessed by any County judge in the organized territory of this Province : Con. Stat. U. C. c. 128, s. 94.

The exercise of the power by the Governor-General of the Dominion, or by the Lieutenant-Governor of the Province, is not inconsistent either with sub-s. 27 of s. 91, or sub-s. 14 of s. 92 of the B. N. A. Act.

The first empowers the Legislature of the Dominion to make laws in relation to the criminal law, except the constitution of the Courts of Criminal Jurisdiction, but including the procedure in criminal matters.

The second empowers the Legislature of the Province to make laws in relation to the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts both of civil and criminal jurisdiction, and including procedure in civil matters in these Courts.

But neither Legislature has as yet attempted to interfere with the prerogative as to special commissions in the case of the unorganized tracts of country or provisional judicial districts ; and when either Legislature shall attempt to do so, it will be time enough to decide which, under the B. N. A. Act, has the power to do so.

There still remains the question as to where, since confederation, the prerogative power exists.

The B. N. A. Act, in s. 9, enacts that the executive government and authority of and over Canada "is hereby declared to continue and be vested in the Queen."

The power being a prerogative one, can only be exercised by the Queen or her representative. The Governor-General of Canada is the only executive officer provided for by the Act who answers this description. The Act, however, by s. 14, makes it lawful for the Queen, if she see fit, to authorize the Governor-General from time to time

to appoint any person or persons, jointly or severally, to be her deputy or deputies within any part or parts of Canada, and in that capacity to exercise during the pleasure of the Governor-General *such* of the powers, authorities, and functions of the Governor-General as the Governor-General deems it necessary or expedient to assign to him or them, subject to any limitations or directions expressed or given by the Queen.

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The commission used by the Dominion Government is tested in the name of the Honourable William Buell Richards, deputy of the Governor-General of Canada; and as there is no statement to the contrary in the case, I must assume that the Queen authorized the appointment of a Deputy Governor, and that the prerogative power in question was conferred by the Governor-General on the Deputy Governor without any limitation or direction on the part of the Queen, and so that it has been exercised by the proper authority.

I am therefore of opinion—

1. That Judge McCrea was legally eligible and legally competent to act under a commission of Oyer and Terminer and General Gaol Delivery properly issued.

2. That such commission was properly issued by the Deputy Governor of the Dominion of Canada.

3. That the appointment and acting of Judge McCrea under the last-mentioned commission was legal.

I express no opinion as to the authority to issue such a commission either under Con. Stat. U. C. c. 11, or Con. Stat. U. C. c. 126, independently of the prerogative of the Crown, or as to the Government empowered to issue such a commission when issued under either of these statutes.

In my opinion the conviction must be affirmed.

ARMOUR, J., took no part in the judgment, not having been present at the argument.

## ONTARIO COURT OF QUEEN'S BENCH.

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REGINA v. LAWRENCE.

[Reported 43 U. C. Q. B. 164.]

*B. N. A. Act, 1867, s. 92, sub-s. 8, 15—Power of Local Legislature  
—Criminal Law.*

A Provincial Legislature cannot legislate with respect to offences of a criminal nature, except where such legislation is required for the direct enforcement of a law of the Province made in relation to a matter coming within its exclusive jurisdiction.

In legislating in regard to a matter within Provincial jurisdiction, a Provincial Legislature has no power to enforce its law by provisions respecting the trial and punishment of offenders in respect of acts which would be criminal offences at common law.

Section 57 of the Liquor License Act of Ontario, R. S. O. c. 181, by which it was provided that any person who, on any prosecution under that Act, tampered with a witness, or induced or attempted to induce any such person to absent himself or to swear falsely, should be liable to a penalty of \$50, was, therefore held to be invalid.

Appeal from a judgment of Gwynne, J.

On the 10th of January, 1878, one Richard Lawrence was convicted before the police magistrate of the city of Toronto for unlawfully inducing certain witnesses in a prosecution under the Liquor License Acts to absent themselves. The conviction was made under R. S. O. c. 181, s. 57.

Various objections were made to the conviction, and amongst others :—

That the tampering with a witness is a crime independently of the Local Act, c. 181, s. 57, R. S. O., under which the conviction took place, and that therefore proceedings should have been taken under the Dominion Statute.

That the Act under which the conviction was had, namely, R. S. O. c. 181, s. 57, is *ultra vires* of the Local Legislature, inasmuch as it professes to enact proceedings and punishment in respect of what was already a crime, or declares that to be a crime and punishable in an exceptional manner which was not a crime before, and in either case is *ultra vires*.

Gwynne, J., gave judgment (1) (Feb. 22nd, 1878) quashing the conviction, and on the same day Mr. Fenton obtained a rule *nisi* by way of appeal.

Mr. Blackstock shewed cause.

Mr. Fenton contra.

The judgment of the Court (Harrison, C.J., and Wilson and Armour, JJ.) was delivered by

HARRISON, C. J. :—

Trial by jury is, by the common law of England the acknowledged right of every person accused of crime.

The course of proceeding in a criminal trial is of great antiquity, and although from time to time improved and simplified, is substantially the same now as it was centuries since.

The Legislature has from time to time dispensed with trial by jury, substituting trial before magistrates, or other similar functionaries, where the offences charged are not of a very serious character, or where it is the desire of the accused to waive trial by jury; and in such cases have changed the procedure to that ordinarily in use before magistrates, or a procedure somewhat resembling it, but all such changes are jealously watched.

It is important that the law of a country as to crime and criminal procedure shall be uniform, so that the rights of all citizens shall be, as much as possible,

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equally respected, and the public wrongs of any citizen, as much as possible, equally punished.

The Imperial Legislature, when uniting the colonies now forming the Canadian Confederation, were influenced by these considerations, for it is expressly declared in the B. N. A. Act that one of the subjects exclusively entrusted to the General Parliament, or Parliament of the Dominion, shall be "the criminal law," including "the procedure in criminal matters:" Sec. 91, sub-s. 27.

It is supposed that to this there is an exception in that part of the same Act which enables a Provincial Parliament to pass laws for the imposition [of punishment] by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects entrusted exclusively to the Provincial Legislatures, s. 92, sub-s. 15; but this, when closely examined, will not be found to be so much an exception as the creation of a new rule not necessarily in conflict with the complete exercise of the Dominion powers.

While two legislative bodies exist, each having distinct and exclusive legislative powers, there must be care exercised by each to avoid encroachment by either body upon the exclusive powers of the other, and this must be prevented by the Courts, whether the encroachment assume the guise of an honest neutral, or the garb of an aggressive enemy.

It never could have been the design of the Imperial Legislature, as manifested by the language which it has used in the B. N. A. Act, to permit any legislative body, under pretence of exercising only its own exclusive legislative powers, to cover ground which in truth by the Constitution belongs to another.

The whole domain of crime and criminal procedure is the exclusive property of the Dominion Parliament, and

to allow the Parliament of a Province to declare that an act which, by the general law, is a crime, triable and punishable as a crime, with the ordinary safeguards of the Constitution affecting procedure as to crime, shall be something other or less than a crime, and so triable before and punishable by magistrates as if not a crime, would be destructive of the checks provided by the general law for the constitutional liberty of the subject.

There are many acts, not being crimes, which are triable before and punishable by magistrates, which, although called offences, are not crimes, and which by the proper legislative authority may be made the subject of summary magisterial jurisdiction, either with or without appeal, but these are not to be mistaken for acts in themselves crimes, and the subject of indictment and of conviction under indictment, either at the common law or by statute. Such acts as these may, by the Provincial Legislature, be made the subject of punishment by fine, penalty, or imprisonment, when this is done for the purpose of enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects exclusively assigned to the Provincial Legislatures.

One of the subjects exclusively assigned to the Provincial Legislatures is the right to make laws as to "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes."

Where the purpose of the Provincial statute is not to raise a revenue for any such purpose, but to suppress some public vice, even by the sacrifice of revenue, the Act is not one which can be validly passed under the words which we have quoted, and, unless held to be the exercise of mere police or municipal power, is void.

Where the effect of such a statute is to interfere with

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the trade and commerce of the Dominion, it is a direct encroachment upon the powers which exclusively belong to the Dominion or general Parliament of the country : s. 91, sub-s. 2.

The Legislature of the Province of Ontario have passed among the Revised Statutes of the Province, "An Act respecting the sale of fermented or spirituous liquors." It prohibits sales without licenses, makes provision for the issue of licenses, for a revenue to be derived by the issue of licenses, for the regulation of persons licensed, and for the punishment of persons violating particular provisions of the Act which are intended to be for the enforcement of the Act : See ss. 39, 40, 43-45, 51 and 53 of the Act.

All prosecutions for the punishment of any offence against any of the provisions of these sections, or any section of the Act, for the contravention of which a penalty or punishment is prescribed by s. 51, whether the prosecution is for the recovery of a penalty, or for punishment by imprisonment may take place before any two or more justices of the peace : sec. 68.

All prosecutions under the Act, other than those mentioned in the preceding section, whether for the recovery of a penalty or otherwise, may be brought and heard before any one or more of Her Majesty's justices of the peace : sec. 69.

Among the prosecutions covered by the last section is the one now before us, and which depends for its validity upon the constitutionality of sec. 57 of the Act.

This section is as follows : "Any person who, on any prosecution under this Act, tampers with a witness, either before or after he is summoned, or appears as such witness on any trial or proceeding under this Act, or by the offer of money, or by threats or in any other way, either directly or indirectly, induces or attempts to

induce any such person to absent himself, or to swear falsely, shall be liable to a penalty of \$50 for each offence."

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The constitutionality of this clause is called in question, because it is affirmed that the acts with which it deals are, and each of them is, the subject of an indictment by the criminal law, and so not the subject of the exercise of power by the Provincial Legislature.

If this contention be well founded in fact, we are of opinion that it is a good contention in law.

No effort was made to sustain the clause under the power of the Provincial Legislature to make laws as to municipal institutions in the Province (B. N. A. Act, s. 92, sub-s. 8), probably because it does not appear in the Municipal Act (R. S. O., c. 174); and whether or not, we are of opinion any such attempt would be futile.

By the criminal law it is clear that every step towards a misdemeanor by an act done is itself a misdemeanor; *Reg. v. Chapman* (1); and this, whether the offence was created by statute or was an offence at the common law: *Rex v. Butler* (2); *Rex v. Cartwright* (3); *Rex v. Roderick* (4).

Subornation of perjury is a crime independently of statute, but is expressly made so by 32 and 33 Vict. c. 23, s. 1, D.

He who endeavours to stifle the truth and prevent the due execution of justice, is punishable as a criminal: Hawk. P. C., 8th ed., Bk. 1, p. 64. So he who dissuades, or endeavours to dissuade, a witness from giving evidence against a person indicted: *Ib.*

This is the law according to 1 Russell on Crimes, 5th ed. p. 361; Stevens' Digest of Crim. Law, p. 97; and 1 Bishop's Criminal Law, 6th ed. s. 468.

(1) 1 Den. C. C. 432.

(2) 6 C. & P. 368.

(3) R. & R. C. C. 107.

(4) 7 C. & P. 795.



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The form of the indictment for dissuading a witness from giving evidence against a person indicted will be found in 2 Chitty's Criminal Law, p. 285.

One test would be whether, under the law which rendered a witness incompetent on the ground of infamy (Com. Dig. Testmoigne, A. 4), a person convicted of tampering with a witness either before or after he is summoned or appears as such witness on any trial or proceeding before magistrates, or who, by the offer of money, or by threats, or in any other way, directly or indirectly, induces, or attempts to induce, such person to absent himself or swear falsely, would be rejected as infamous.

The rule was, that it was the crime and not the punishment which made the person infamous and incompetent as a witness: *Pendock v. Mackender* (1); *Priddle's Case* (2). Persons convicted of the following offences have been held infamous: petit larceny: *Pendock v. Mackender* (1); conspiracy: *Priddle's Case* (2); and tampering with a witness: *Clancey's Case* (3).

Clancey's Case (3) contains some observations of value in this case. The point arose in this manner: Upon a debate in the House of Lords, on the 15th of December, 1696, relating to the Bill for attainting Sir John Fenwick of high treason, the opinion of all the judges then present was asked whether one Clancey, who had been convicted of the misdemeanor of actually giving one George Porter 300 guineas and promising more to withdraw himself into France, thereby to prevent his further evidence against Sir John Fenwick and others, might be admitted as a witness. And it was adjudged that Clancey was incompetent, "for his crime was a base and clandestine endeavour to obstruct the

(1) 2 Wils. 18.

(3) Fort. 208.

(2) 1 Leach, 442.

public justice of the kingdom, not by discoursing or arguing with a witness, or endeavouring to convince him with reason, but by downright bribery and corrupting him with money, which no man would attempt but a base, mean and infamous rascal."

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This case was, in 1826, followed in *Bushel v. Barrett* (1), where the person offered as a witness, together with another person, had been previously convicted of persuading and hindering a witness from appearing on a prosecution before magistrates under the excise law, and fined £200.

*Bushel v. Barrett* (1) is noticed in *State v. Keys* (2).

The latter has since been followed in *State v. Carpenter* (3), where it was held that an attempt, whether successful or not, to obstruct the administration of justice, by preventing the attendance of witnesses bound to appear and testify before a grand jury, is a substantial offence, punishable at common law.

The defendant in *Rex v. Johnson* (4) was indicted and convicted of an attempt to suborn a witness to prove a deed [to be forged], and, according to the pathetic language of the reporter, "broke his heart and died soon after."

The defendant in *Rex v. Lawley* (5) was convicted "for attempting to persuade a witness not to appear and give evidence against Japhet Croke, for forgery," and "was fined three hundred marks and to suffer one month's imprisonment."

It may be argued that the crime only exists at common law where the trial at which the witness was to have given evidence is a trial in one of the Superior Courts, and not simply before a magistrate.

(1) R. & M. 434.  
(2) 8 Vermont, 57.  
(3) 20 Vermont, 1.

(4) 2 Show. 1.  
(5) 2 Stra. 904.

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While this distinction, for peculiar reasons inapplicable here, exists where the charge is for compounding an offence: See *Rex v. Crisp* (1); *Reg. v. Mason* (2), it does not appear to apply when the offence is that of tampering with a witness.

In *Bushel v. Barrett* (3), where the offence was, as already mentioned, for tampering with a witness summoned to give evidence before magistrates, Gaselee, J., after consulting with Littledale, J., said, at p. 495: "The essence of the offence of which the witness is convicted is the attempt to pervert the course of justice, and that by corrupting a witness. The magnitude of the judicial proceeding which it is attempted to obstruct is immaterial; the attempt to pervert is the same whether it be on a charge for high treason or a misdemeanor."

We are of opinion that the acts declared to be offences under s. 57 of the Liquor License Act of Ontario, were, before the passing of that Act, criminal offences at the common law, and so not within the power of a Provincial Legislature either as coming under "Municipal Institutions," or under the pretence of being passed to enforce a law as to shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for Provincial, local, or municipal purposes.

We therefore concur with the opinion of Mr. Justice Gwynne, in holding that s. 57 of the Liquor License Act of Ontario is *ultra vires*, and that a conviction had under it must be quashed.

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(1) 1 B. & Al. 282.

(2) 17 U. C. C. P. 534.

(3) R. & M. 434.

JUDGMENT OF GWYNNE, J. (*before whom the case came in the first instance.*)

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[*Reported 43 U. C. Q. B. 168.*]

GWYNNE, J. :—

The power of the Local Legislature to pass any law inflicting punishment upon any person for the commission of any act of the nature of a crime, is to be found in the 15th sub-sec. of the 92nd sec. of the B. N. A. Act, by which it is enacted that the Legislature in each Province may make laws in relation to the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in the 92nd sec.

In the 9th sub-sec., which is the one with which we have to deal here, we find the Local Legislature empowered to make laws in relation to shop, saloon, tavern, auctioneer, and other licenses, *in order to the raising of a revenue* for Provincial, local and municipal purposes.

Taking these two sub-sections together, the result appears to be that, in order to the raising of revenue for Provincial, local or municipal purposes, the Legislature may pass laws imposing a fee or duty for tavern and other licenses; and for enforcing such law, they shall also have power to impose punishment by fine, penalty, or imprisonment. Now, what is the legitimate construction of the term "*for enforcing*" a law relating to tavern and other licences, in order to the raising of a revenue for Provincial, local or municipal purposes? The object of the law is the raising of a revenue. *In order to the raising of a revenue*, the Legislature may pass a law imposing a fee to be paid for tavern and other licenses. For enforcing this law—that is to say, as it appears to me, for enforcing obedience to this law—the Legislature may prohibit the sale of spirituous liquors otherwise than is prescribed in the license or authorized by the law; and for any violation of the terms of such license, or of the law regulating the granting licenses, the law may impose a fine, penalty, or imprisonment, thereby *enforcing* obedience to it.

Now, the 57th and 59th ss. of c. 181 of the Revised Statutes, which are the 42nd and 43rd ss. of 37 Vict. c. 32, and which, together with the 65th sec. of c. 181, identical with the 21st sec. of 40 Vict. c. 18, are the clauses relied upon as supporting this conviction, enact that "any person who, on any prosecution under this

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Act, tampers with a witness, either before or after he is summoned or appears as such witness on any trial or proceeding under this Act, or by the offer of money, or by threats, or in any other way, either directly or indirectly, induces or attempts to induce any such person to *absent himself*, or to swear falsely, shall be liable to a penalty of fifty dollars for each offence : 37 Vict. c. 32, s. 42 ; and if the fine be not paid, and no sufficient distress is found to satisfy the conviction, then it shall be lawful for the justices or police magistrate to order that the person so convicted be imprisoned in any common gaol, etc., within the county, etc., for any period not exceeding thirty days, unless the penalty and all costs are sooner paid : 37 Vict. c. 32, s. 43.

And by 40 Vict. c. 18, s. 21, it is enacted that all informations or complaints for the prosecution of any offence against any of the provisions of this Act, or of the Acts thereby amended, including 37 Vict. c. 32, shall be laid or made in writing, etc., but may be made without any oath or affirmation to the truth thereof, and the same may be according to a form given in a schedule of the Act.

Now, dissuading a witness from appearing and giving evidence on an indictment for any offence is a misdemeanor at common law : *Rex v. Lawley* (1).

In 2 Chitty's Criminal Law, 235, a form of indictment is given in such case, where it is also said that the mere attempt to stifle evidence is criminal though the persuasion should not succeed, on the general principle now fully established, that an incitement to commit any crime is itself criminal.

In 1 Russell on Crimes, 5th ed., p. 361, the law is laid down thus : " All who endeavour to stifle the truth, and prevent the due execution of justice, are highly punishable ; and therefore the dissuading or endeavouring to dissuade a witness from giving evidence against a person indicted is an offence at common law, though the persuasion should not succeed." And in 3 Russell on Crimes, p. 1 : Inciting a witness to give *particular* evidence, where the inciter does not know whether it is true or false, is a high misdemeanor indictable at common law ; citing *Rex v. Edwards*, decided in 1764.

In *Rex v. Higgins* (2), it is laid down that an attempt to commit a misdemeanor is itself a misdemeanor. So where an indictment charged a defendant with *an attempt* to suborn one to

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commit perjury, it was unanimously holden by all the Judges to be a misdemeanor; and in Johnson's Case, there cited from 2 Show. 1, the offence said to have been charged was, tampering with a witness before trial to give evidence for a corrupt consideration, which was held to be an offence against public justice. And in such a case, namely, inciting another to commit a misdemeanor, it is not necessary to aver that anything was done in pursuance of the incitement (1). The rule as laid down there is "all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable."

Now, granting that the Local Legislature has authority to pass a law imposing a duty for tavern and other licenses and imposing a fine for selling liquor without paying such duty, or contrary to the terms and conditions of a license thereupon granted, or for a licensed person selling at prohibited hours, and assuming it also to have authority to give to a single magistrate jurisdiction to hear and determine any prosecution for such offence without a jury, and to impose a fine upon conviction, then the Magistrates' Court being so made the competent tribunal to hear and determine the charge, it seems to me to be as much to the prejudice of the community, and as derogatory to the due administration of public justice, that a witness should be tampered with and induced to absent himself, and not to give evidence upon such a prosecution, as it would be to do the like upon an indictment for any offence being a misdemeanor at common law, or made so by statute; and unless there be a distinction between such a prosecution and an indictment for an indictable offence, the tampering with the witness and the inducing or attempting to induce him to absent himself and not give evidence, is equally in either case an indictable offence at common law.

The result seems to be that what is pointed at by the 57th sec. of c. 181 of the Revised Statutes, down to and including the words "*absent himself*," was either an offence at common law and indictable as such, wholly independently of that section, or else that section professes to make that to be a crime and punishable as such which before was not a crime; and, at any rate, there can be no doubt that the adding the words "*or to swear falsely*," in the same section, to the words "*absent himself*," made the whole section deal with a common law offence, viz., subornation of perjury in respect

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(1) 2 East, 19, 21.

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of a matter before a tribunal *ex concessis* competent to entertain the charge ; to receive evidence upon oath and adjudicate thereupon.

The clause, then dealing with an offence clearly indictable at common law—subornation of perjury—was *ultra vires* of the Local Legislature, unless the clause, although dealing with what would be a misdemeanor at common law, is brought within the jurisdiction of the Local Legislature by sub-s. 15 of s. 92 of the B. N. A. Act—that is to say, unless clause 57 of c. 181 of the Revised Statutes can be held to be a clause relating to the imposition of punishment by fine, penalty, or imprisonment, *for enforcing* the law respecting the sale of spirituous liquors, and the raising of revenue for Provincial, local, or municipal purposes, by the granting of licenses authorizing and regulating such sale. Now can a clause professing to punish a person for inducing or attempting to induce, by bribery or threats, a witness not to give evidence, or to give false evidence, upon a prosecution, although it be a prosecution for an offence against the Liquor License Act, be regarded as a clause within the meaning of the 15th sub-sec. of the 92nd sec. of the B. N. A. Act, *for enforcing* the Act for regulating the sale of liquors ?

In my judgment it cannot. The provision in the 57th sec. is made in relation to an offence wholly collateral to the prosecution for a violation of the Liquor License Act. That prosecution may be said to be *for enforcing* the law, but a clause for punishment of subornation of perjury committed by persons, it may be, utter strangers to any license, and in no way guilty of violating any of the provisions relating to licenses or the sale of liquors, can in no sense be said to be a clause *for enforcing* obedience to the law relating to the sale of spirituous liquors, or regulating the licenses issued therefor ; that is a matter affecting the due administration of justice, in which the community at large is interested. It is a clause which in fact professes to provide a Court and procedure wherein and whereby, in a particular case, a person guilty of an offence indictable at common law may be tried and convicted, contrary to the course of the common law or of the criminal statute law in like cases. It affects to alter the procedure in a criminal case in a very marked degree, and affects to compel a person charged with subornation of perjury in a prosecution under the Liquor License Act to submit to the jurisdiction of a single magistrate without any information upon oath being laid, and to be tried and sentenced to fine and imprisonment without the intervention of any jury and against the will of the accused. The Local Legislature has no more power, as it appears to

me, so to interfere with the procedure in a charge of subornation, of perjury committed or attempted to be committed, in one case any more than another, or to deprive the subject of his constitutional rights when accused of such an offence, whether the offence be charged to have been committed in connection with a prosecution instituted for enforcing the Liquor License Act, or in any other matter. Clause 57, therefore, of c. 181 of the Revised Statutes, appears to me to be *ultra vires* of the Local Legislature, and to be an encroachment upon the jurisdiction of the Dominion Parliament.

The conviction, therefore, which is rested solely upon that section and s. 65, must, as it seems to me, be quashed.

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## ONTARIO COURT OF QUEEN'S BENCH.

1879

Aug. 29;

Dec. 12.

*Re* HARRIS AND THE CORPORATION OF THE CITY OF  
HAMILTON.

[Reported 44 U. C. Q. B. 641.]

*Municipal Corporations—Market Regulations—Power of Provincial  
Legislature—R. S. O. c. 174, s. 466, sub-s. 6.*

The provision contained in the Municipal Act of Ontario, authorizing City Councils to pass by-laws "for preventing criers and vendors of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto," is not *ultra vires* of the Ontario Legislature, as being a regulation of trade and commerce.

In giving jurisdiction to the Provincial Legislatures in all matters relating to municipal institutions, the intention must have been that these Legislatures should have power to alter and amend all the existing laws with respect to such institutions, and especially to enlarge the scope of a power existing in the Municipal Act at the time of Confederation.

On the 24th of June, 1879, Mr. *Robinson*, Q.C., obtained a rule *nisi*, on behalf of George Harris, calling upon the Corporation of the City of Hamilton to shew cause why by-law No. 149 of that corporation, passed December 9th, 1878, should not be quashed, wholly or in part, with costs, on the ground, amongst others, that if the said by-law was authorized by Act of the Provincial Legislature the said Act was unconstitutional and *ultra vires*.

The clauses in question of the by-law were as follows :

3. On and after the first day of May next, after the passing of this by-law, no crier or vendor of small wares shall practise his or her calling in the James street market, or in the public street adjacent thereto.

4. On and after the first day of May next, after the passing of this by-law, no person shall use or occupy any portion of the James street market for the purpose of exposing for sale or selling dry goods, fancy goods, small wares or merchandise, pastry, confectionery, medicines, or any article other than meat, fish, fruits, vegetables, poultry, eggs, and farm and dairy products.

5. From and after the eighteenth day of December, one thousand eight hundred and seventy-eight, and up till the first day of May next thereafter, that part of the James street market consisting of the north-east corner thereof, and being bounded on the north by Merrick street, on the east by the poultry-sheds sidewalk, on the west by the central main sidewalk running north and south, and on the south by the sidewalk running in a westerly direction from, at or near the end of the fish-stalls, shall be set apart for occupation by all criers and vendors of small wares or merchandise, and such other persons as under sections three and four of this by-law shall, after the said first day of May, be thereby excluded from the said market; and such criers and vendors of small wares or merchandise, and other persons in this section referred to, shall, from and after the passing of this by-law, be entirely excluded from all parts of the said James street market, other than the portion thereof contained within the limits in this section mentioned.

Mr. McKelcan, Q.C., shewed cause.

Mr. H. J. Scott supported the rule.

ARMOUR, J.\*:—

By the municipal law, as it stood before Confederation, 29 & 30 Vict. c. 51, s. 296, the Council of every city, town, and incorporated village might respectively pass

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\* This case was heard by Armour, J., sitting alone.

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by-laws for the following purposes: sub-section (6) for establishing markets; (7) for regulating all markets established and to be established—the places, however, already established as markets in such municipality shall continue to be markets, and shall retain all the privileges thereof, until otherwise directed by competent authority, and all market reservations or appropriations heretofore made in any such municipality shall continue to be vested in the corporation thereof; (8) for preventing or regulating the sale by retail in the public streets of any meat, vegetables, fruit, or beverages; (9) for preventing or regulating the buying and selling of articles or animals exposed for sale or marketed; (10) for regulating the place and manner of selling and weighing butchers' meat, fish, hay, straw, fodder, wood and lumber. Of these sub-ss. 6, 7 and 9 still continue to be the law, and appear in the R. S. O. as sub-ss. 2, 3 and 5 of s. 466 of c. 174. Sub-ss. 8 and 10 of 29 & 30 Vict. c. 51, s. 296, had substituted for them by 33 Vict. c. 26, ss. 5 and 6, the following sub-sections, which are now sub-ss. 4 and 6 of R. S. O. c. 174, s. 466; (4) for preventing or regulating the sale by retail in the public streets or vacant lots adjacent thereto of any meat, vegetables, grain, hay, fruit, beverages, small ware, and all other articles offered for sale; (6) for regulating the place and manner of selling and weighing grain, meat, vegetables, fish, hay, straw, fodder, wood, lumber, shingles, farm produce of every description, small ware, and all other articles exposed for sale, and the fees to be paid therefor; and also for preventing criers and vendors of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto.

It was contended that these two sub-ss. 4 and 6, having been enacted since Confederation, were, or at all events that part of sub-s. 6, for preventing criers and vendors

of small wares from practising their calling, etc., was *ultra vires* of the Ontario Legislature, as being an interference with "the regulation of trade and commerce,"—a matter within the exclusive legislative authority of the Parliament of Canada.

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I do not, however, think that the provisions in question are a regulation of trade and commerce within the meaning of these words as used in the B. N. A. Act, so as to be beyond the powers of the Local Legislature, but are provisions for municipal government, and as such within the powers of the Local Legislatures, which may exclusively make laws in relation to matters coming within that class of subjects denominated municipal institutions in the B. N. A. Act.

In using the term municipal institutions in the B. N. A. Act it must have been in the contemplation of the Legislature that existing laws relating to municipal institutions should not be affected, and that the Local Legislatures should have power to alter and amend these laws, especially where, as in the case of the provisions under discussion, the Local Legislature has only enlarged the scope of a power existing in the Municipal Act at the time of Confederation.

The Councils of cities, towns, and incorporated villages could pass by-laws, at the time of Confederation, for preventing the sale, by retail, in the public streets, of any meat, vegetables, fruit, or beverages. The Local Legislatures have surely the authority under their powers to make laws in relation to municipal institutions to extend the scope of this power of prevention, by applying it to vacant lots adjacent to the public streets, and by including within it grain, hay, small ware, and other articles offered for sale.

The power to prevent the sale, by retail, of certain articles in the public streets is the same in substance as

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the power of preventing the sellers, by retail, of such articles from practising their calling in the public streets, and it is merely an extension of the scope of that power to prevent the criers and vendors of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto.

I think the sub-sections in question were not beyond the powers of the Local Legislature to enact, and that the by-law is not assailable on that ground.

[The remainder of the judgment is omitted, the same not having reference to the present question.]

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ONTARIO COURT OF QUEEN'S BENCH.

REGINA v. THE COLLEGE OF PHYSICIANS AND SURGEONS  
OF ONTARIO.

[Reported 44 U. C. Q. B. 564.]

1879

Nov. 27;

Dec. 27.

*Medical practitioner—Registration in England—Refusal to register*  
—B. N. A. Act, s. 93.

The Imperial Parliament having enacted since Confederation that any person registered as a medical practitioner under the English Medical Act (21 and 22 Vict. c. 90), shall be entitled to be registered in any colony upon payment of the fees required for such registration, and that the term "colony" shall include any of Her Majesty's possessions which have a Legislature, the enactment was held to apply to Canada and to override Provincial regulations for the examination of applicants for registration, notwithstanding the Confederation Act and the exclusive power given thereby to the Provinces to legislate in relation to education.

Mr. *Kingstone* obtained a rule *nisi* calling on the defendants to shew cause why they should not admit to registration, and enter, or cause to be entered, by the registrar of the said college, the name of Albert Elhanan Mallory in the book or register of the said college, as being duly qualified and licensed to practise medicine, surgery, and midwifery, in the Province of Ontario, and as a member of the said college.

It appeared from the affidavits filed, that the said Mallory had been duly registered under the Imperial Act, known as the Medical Act, on the 5th of April, 1879, and that on the 9th of May following he applied to the Registrar of the College of Physicians and Surgeons of Ontario to be registered under the "Ontario Medical

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Act" (R. S. O. c. 142), paying him the registration fee of \$10, but that the college refused to enter his name upon their register.

Mr. Crooks, Q.C., shewed cause.

The question raised is, whether the provisions of the Ontario Act, under which this college has been incorporated, justify its council in refusing to admit to their register the applicant, notwithstanding his being upon the Imperial medical register. The college contends that it is entitled to impose such conditions upon such applicants for registration here as in its judgment it may think proper; and the college has required that all those upon the Imperial medical register since 1870 should successfully pass the examination in the regular subjects prescribed for the final examination, and should also pay certain fees. About a year since Dr. Baldwin presented the same question for the consideration of the college, and the council then thought fit to accede to his request, upon the assumption that the Imperial Act might be held to govern in such a case, and with the intention on the part of the council to make such representations to the Imperial authorities as would preserve in the future the authority conferred upon the council by the Provincial Act. The council considered that an express provision of the B. N. A. Act of 1867, under which that authority was conferred, had been violated by the British Act of 1868; and that upon this being represented to the Imperial Government the jurisdiction of the Provincial Legislature would be allowed its full effect. As the subject is before the Imperial Government for consideration, the council consider that if this Court were to decide that the Imperial Act overrides the Provincial Statute, it would be an additional reason for the Imperial Government limiting their Act, so as not to conflict or interfere

with the jurisdiction of the Ontario Legislature. The case is therefore *sui generis*. It is not a question of *ultra vires*, but of a Provincial Act on a subject which, by the 93rd section of the B. N. A. Act, is within its exclusive jurisdiction to deal with. Formerly there were some five bodies whose degrees or examinations would entitle to practise. These facilities led to abuse, and justified the general opinion, which was carried into effect by the Provincial Act, that there should be a uniform course of study and system of examination for the license to practise in Ontario. The college in its course requires not only theoretical knowledge to pass the final examination, but proof of practical experience as well. It is well known that the circumstances of this country involve more general knowledge on the part of the practitioner, if he is to be successful, than in England, where the duties are so much distributed. The legislation, which was intended to secure guarantees of efficiency, has already produced a greatly improved condition in this respect. The primary examination is now a valuable protection against ignorance, and the curriculum insisted on shews that the course of study is one which ought to secure the competency of one person in all the branches, just as in the case of one person being solicitor, attorney, and barrister at the same time; and this is no less required by the circumstances of the country. Here the Legislature of Ontario is found exercising its clear authority in passing an Act not only within its jurisdiction, but its "exclusive jurisdiction," conferred upon it by the 93rd section of the B. N. A. Act, and upon a subject which concerns the welfare of Her Majesty's subjects in this Province. Should not full effect, therefore, be given to an Act passed by the Provincial Legislature on a subject committed to it by the Imperial Parliament, and which is one of the subjects which clearly come

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within the jurisdiction exclusively resting with the Provincial Legislature? The Act which is invoked in answer to this is the Imperial Act, passed the 29th May, 1868 (c. 29, 31 Vict.), which extends the 31st section of the "Medical Act" of 1858. The question depends upon the legal principles which should be applied to such an Act, having regard to the B. N. A. Act of 1867, and the condition of matters at the time the Act of 1868 was passed. Persons registered under the Medical Act of 1858 had no right, by virtue of such registration only, to practise in the Province of Ontario, and had to rely on such provisions as were made in their favour in the Provincial Statute. Hence the attempt of those who were instrumental in securing the passing of the Act of 1868 would have evidently been to include this Province as well as other dependencies of the empire. Hence in sec. 2 we find the word "Colonies" given a very extensive interpretation, and which, *prima facie*, would constitute registration under the Act of 1858 full authority to practise in any part of Her Majesty's dominions, including those possessing Legislatures as well as Crown colonies. To this extent, therefore, the argument is against the college; and it is upon this that the other side relies. Before, however, any of the express powers granted by the B. N. A. Act, either to the Dominion Parliament or Provincial Legislatures, can be repealed, the Imperial Parliament must have used language sufficiently clear and explicit to shew that such repeal was intended by the Imperial Parliament, and not to be the result of general words which do not indicate the grave and important step Parliament was about to take, restricting in its effect the unlimited jurisdiction conferred on the Provincial Legislatures by the 93rd section of the B. N. A. Act. The argument, therefore, is that when, in 1867, the Imperial Parliament thought fit to grant to the

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Provincial Legislatures the whole jurisdiction and duty over education in the Provinces, and embodied this as an important article of a formal constitution, then, before the jurisdiction can be considered to have been withdrawn or in any way limited, the Imperial Parliament must be shewn to have done so by express words which would unequivocally shew that it was the deliberate intention of the Imperial Parliament to infringe upon this Provincial jurisdiction, and to deprive the Legislature of its rights and duty of exercising its judgment in the matter. This, again, would involve such a change in the policy of the whole scheme of Confederation, by which this and other subjects were exclusively confined to the Local Legislatures, and which, as recited in the B. N. A. Act, was in the nature of a compact between the United Kingdom and the several Provinces, that if there ever was a case for the application of the principle contended for this is a case of the kind. Effect can be given to the Imperial Act without carrying it to the extent of being an invasion of Provincial rights ; namely, by giving to registration on the British Medical Register the same status in the Provinces when further conditions have not been lawfully imposed by the sovereign legislative authority of any such Province. The position would then be very much like that in *Smiles v. Belford* (1), where the Court held that, in order to obtain the complete benefit of an Imperial copyright in Canada, it was necessary for the publisher to bring his work within the Canada Copyright Act as well. The college, under the authority of the Provincial Act, requires an examination from all practitioners who are on the British Medical Register since 1870, and it insists on *every one* being up to its standard of examination before being entitled to be placed on the Provincial Register. This is the only

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(1) 1 App. Rep. 436 ; ante, p. 576.

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question which has given rise to the present dispute. The proper view, and the one which removes all conflict between the Imperial and Provincial jurisdiction, is to construe the position granted under the Imperial Act of 1868 as subject always to the exercise of such authority as the Provincial Legislature has had committed to it. This is a stronger case than that of *Smiles v. Belford*, for in it no exclusive jurisdiction has been given to Canada, nor had the Imperial Parliament expressly assumed to deprive itself of its general jurisdiction in matters of copyright. This argument is not going too far; for when we find in the Constitutional Act of 1867 the Imperial Parliament making clear provision for an exclusive jurisdiction in certain specified subjects in this Province, and in the following year passing another Act which does not assume to refer to such specially conferred authority, it would be to impute to the Imperial Parliament such a hasty change of intention as would be opposed to the whole course of its proceedings. There is, in truth, such repugnancy between the assumed operation of this Act of 1868 and the full jurisdiction expressly conferred by that of 1867, that upon this principle also of repugnancy the Act of 1868 must be limited in its effect, as contended for. The duty imposed on the Provincial Legislature for the welfare of its community is not fulfilled by requiring that the fees only should be paid, but it is bound to go further and to require that medical efficiency in this Province should be secured by such means as in its judgment it may deem best. It would be a dereliction of such duty to omit to do this, and especially where one of its beneficial results is, the great improvement in the standard of medical education, and the progress of medical study and higher training in the medical schools, not only in this Province, but elsewhere where medical study may be pursued. The

Legislature and council of the college have not exceeded this duty, and the examination is only a reasonable regulation. Applicants for registration are only subjected to the payment of the fees for registration and examination as in all other cases, and such applicants are not placed in any worse position than a graduate with a medical degree obtained in the Provincial University here. It is always open for the Legislature to impose checks upon any unreasonable regulation, or one which would be prohibitory or unfairly discriminate between the two classes of applicants. It is also always open to the Dominion Government to disallow Provincial Acts, just as Dominion Acts may be disallowed by the Queen in England. The cases discussed in Maxwell on the Interpretation of Statutes, pp. 157, 164, support the proposition that general Acts do not repeal Acts conferring special powers or privileges. No enactment has been passed in modern times of such gravity as the Constitutional Act of 1867, and it is well known that all its provisions were as carefully discussed and considered as if it had been a compact between independent nationalities. It was necessary, it is true, that it should assume the form of an Imperial Act, but it was intended to be lasting and permanent, and therefore only subject to alteration after the like consideration by the contracting parties; and certainly it would be a surprise if the powers and authorities thereby deliberately conferred were to be liable to restriction or limitation in any Session of the Imperial Parliament without previous communication with, or reference to, the relatively independent Legislatures thereby established. Such would be an infringement of that liberty of governing ourselves and of managing our own affairs which was granted to us by the B. N. A. Act, and which necessarily involved new relations between the Dominion Parliament and the

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Legislatures of the different Provinces and the Imperial Parliament. It would take by surprise any of the statesmen who had to do with Confederation in 1867 to find that in the first year thereafter an Imperial Act was passed which, if the contention of the other side prevail, would deprive this Province of one of the powers expressly conferred upon it. While the 93rd section is explicit as to the Provincial jurisdiction over education, yet the argument is applicable also to any infringement of the full jurisdiction which is given to the Province over local or Provincial subjects. Where the jurisdiction has been expressly given, then it is further necessary that there should be express and particular words in order to effectually repeal express and particular powers granted by the former Act of Parliament. Without such particular words it cannot be said that the Legislature meant to take away these powers, especially when there was no reservation to that effect. In a case before Lord Hatherley, when Vice-Chancellor—*Fitzgerald v. Champneys* (1)—he says: "In passing the special Act, the Legislature had their intention directed to the special case which the Act was meant to meet, and considered and provided for all the circumstances of that special case; and, having so done, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which, by their own special Act, they had thus carefully supervised and regulated." So that something more is required before it can be held that the provisions of the Act of 1868 were intended to infringe upon this Provincial jurisdiction. It does not assume to do this, but is only an enabling Act under which the practitioner may place himself in an authorized position to practise, but not to free himself from other

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(1) 2 J. & H. pp. 54, 55.

conditions which may be imposed by such Legislatures as have been expressly authorized to do so. If the contrary is held, the consequences will be serious. It will be a blow to that exclusive jurisdiction of the Provincial Legislatures in local matters, which was the chief cause for bringing about the Canadian Confederation, and if within the ordinary exercise by the Imperial Parliament of its powers it can as readily affect the legal profession, and even the jurisdiction of the Dominion Parliament on larger subjects, even that of the tariff. In fact, the B. N. A. Act would cease to be regarded as possessing the fundamental qualities of a constitution or system of government. The Court of Appeal, in *Smiles v. Belford*, pointed out the necessity there was, in order that British copyright might be effectual here, that a Canadian one should also be obtained, or that there should be further legislation in Canada. If it was intended that the Imperial Parliament should retain power of authorizing practitioners on the British Medical Register to practise in Canada on such terms as that Parliament should think fit to prescribe, it should have reserved this in the B. N. A. Act. The whole scope and framework of that Act shew that it intended to give to the people of Canada, in their Dominion and Provincial relations, the fullest rights of self-government according to the principles of the British Constitution, the same in all Canadian matters as the people of the United Kingdom enjoy. The expression in the Act of 1868, "notwithstanding any Legislature," cannot properly be construed to apply to restrain any such powers in the future as have been exercised by the Legislature of this Province under the circumstances mentioned. The position that it was a necessary and beneficial measure on the part of the Ontario Legislature to pass its Act in 1869 is further established by experience since, as the college has been

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found to have succeeded in thoroughly fulfilling the objects for which it was incorporated, in raising the qualifications of medical practitioners throughout this Province. There is no doubt that if the attention of the Imperial Parliament had been called to this Act, and to its operation as is now contended for, it would have been deemed such an interference with the provisions of the Confederation Act passed in the previous year that this Act would never have received the assent of the British Parliament, or have become law. The mischief of such interference would have been readily seen, and its results prevented by proper provisions inserted therein for the purpose.

*Mr. Kingstone, contra.*

Dr. Mallory is entitled to be registered in the Medical Register of the Province of Ontario, for he has proved, and it is not disputed, that he has been duly registered in the medical register of the United Kingdom. Being so registered, he is, apart from the late Imperial Act, entitled, by virtue of the Medical Act, 1858 (22 Vict. c. 90, s. 31), to practise medicine and surgery in any part of Her Majesty's dominions. By the Imperial Act known as the Medical Amendment Act, 1868 (32 Vict. c. 29), a power which they had not before was conferred on Colonial Legislatures, to make laws for enforcing the registration in the colonies of persons registered under the British Medical Act; but, while conferring that power, the Imperial Legislature chose to impose on the Legislature exercising that power a certain condition, namely, that in the event of the Legislature requiring gentlemen registered under the British Medical Act to be registered in the colony, those gentlemen should be entitled to be registered in the colony on payment of the fee prescribed for registration.

The Legislature of the Province of Ontario took advantage of this Act, and by 37 Vict. c. 30 (c. 142, R. S. O.), compelled gentlemen registered under the British Medical Act to be registered in this Province. See secs. 31, 40, 42, 43, 44, 45 and 55. These gentlemen are therefore entitled, on payment of the fees, and without submitting to any examination, to demand registration with the Medical Registrar of this Province.

It has been argued that sec. 93 of the B. N. A. Act conferred on the Province of Ontario the exclusive right to legislate respecting education, and that this question of education is one of registration, and that the Legislature of Ontario has given the College of Physicians and Surgeons the option of refusing to admit to the Medical Register of Ontario gentlemen registered under the British Medical Act.

There are two answers to this argument. In the first place, the exclusive power referred to is "exclusive" merely as regards the Dominion Parliament, and has no reference to the Imperial Legislature: See s. 91, sub-s. 10, where exclusive powers conferred on the Dominion, cannot be construed to exclude legislation by the Imperial Parliament, but merely that by the Local or Provincial Legislatures. See also *Smiles v. Belford* (1).

In the second place, the words of the Imperial Act of 1868 are positive and distinct, and leave no room for argument as to what their meaning is, and the Act is later than the B. N. A. Act. It is therefore simply a question of the paramount right of legislation vested in the Imperial Parliament. That the Imperial Parliament has such a right, see *Routledge v. Low* (2), Broom's Com. vol. i. pp. 120, 126, 191; Stephen's Com. vol. i. 125.

The College of Physicians and Surgeons is not injured by being compelled to register those registered in the

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(1) 1 App. Rep. 442; ante, p. 576.

(2) L. R. 3 H. L. 100.



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United Kingdom, for the college had no corporate existence until after the Medical Act of 1858 had been passed, and the Act of 1868 was a relaxation of the law in favour of the college, by enabling it to enforce registration of those registered under the British Medical Act, though preserving the right of the latter by enabling them to claim registration as a right.

The answer to the analogy sought to be established from the local laws relative to English barristers is, that there is no Imperial statute defining their position in Canada. Some reference has been made to a by-law of the college, whereby gentlemen claiming registration under the provisions of the Imperial Act are required to pay a fee of \$40 instead of the usual fee of \$10. Such a by-law is clearly bad, as an evasion of the law; but it is not necessary to consider it here, as Dr. Mallory's fee was paid and accepted by the college before the by-law was passed.

The judgment of the Court (Hagarty, C.J., and Armour and Cameron, JJ.) was delivered by

HAGARTY, C.J.:—

In the manner in which the matter has been argued and placed before us, we understand that, apart from technical objections, our opinion is desired as to the right of the defendants to refuse registration to a regularly qualified and registered practitioner, under the Imperial Act known as the Medical Act, without submitting to the examinations prescribed by the rules of the defendants' college.

This applicant has paid, or offered to pay, the ordinary fees required for registration.

Shortly before Confederation, the then Parliament of Canada passed the Act (1865) 29 Vict. c. 34, providing for a register of licensed practitioners, and for the admis-

sion thereto on a fee of \$5 for qualification obtained up to 1st of January, 1866, and not to exceed \$10 for qualification obtained thereafter. Schedule A contained a list of [the qualifications required] for registration, amongst them medical or surgical degree or diploma of any University in Her Majesty's dominions; diploma or license as physicians or surgeons from the Royal College of Physicians or Royal College of Surgeons, London; or a certificate of registration under the Imperial "Medical Act" 21 & 22 Vict., or any Act amending the same.

The B. N. A. Act, passed 29th of March, 1867, sec. 98, declares the Provincial Legislature "may exclusively make laws in relation to education."

On the 24th of March, 1874, the Ontario Act 37 Vict. c. 30, was passed, to amend and consolidate the laws relating to the medical profession in Ontario, repealing previous Acts. The main provisions appear in R. S. O., c. 142, s. 24. All persons qualified under schedule B prior to July, 1870, may register on payment of a fee of not over \$10; and (sec. 25) all persons not so qualified should submit to examination. This section B (as in the Act of 1865) allows as a qualification the certificates of registration under the Imperial Medical Act, or any Act amending same.

But as the present applicant obtained his Imperial qualification long after 1870, it is urged here that he cannot claim any privilege therefrom.

Sec. 23 leaves it optional with the council to admit to registration persons registered in Great Britain, on such terms as the council may deem expedient.

Sec. 25, as to a person not qualified under schedule B: besides examination he must pay such fees as the council may by general by-law establish.

On behalf of the applicant, the Imperial Act 21 & 22 Vict. c. 90, and the amended Act of 1868, hereafter cited, are strongly relied on.

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The Imperial Act (1858) established a Medical Council and Register. Sec. 31 declared that every person so registered should be entitled to practise medicine and surgery "in any part of Her Majesty's dominions."

The Imperial Statute 31 Vict. c. 29, was passed on the 29th May, 1868. It recites that by sec. 31 of the "Medical Act," 21 & 22 Vict. c. 90, it is enacted that every person registered under this Act shall be entitled, according to his qualification or qualifications, to practise medicine or surgery, as the case may be, in any part of Her Majesty's dominions, and to demand and recover in any Court of law, with full costs of suit, reasonable charges for professional aid and advice and visits, and the costs of any medicines or other medical or surgical appliances rendered or supplied by him to his patients.

It enacts (2): "The term 'Colony' shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a Legislature as hereinafter defined, except the Channel Islands and the Isle of Man. The term 'Colonial Legislature' shall signify the authority other than the Imperial Parliament or Her Majesty in Council competent to make laws for any colony."

3. "Every Colonial Legislature shall have full power from time to time to make laws for the purpose of enforcing the registration within its jurisdiction of persons who have been registered under the 'Medical Act,' anything in the said Act to the contrary notwithstanding; provided, however, that any person who has been duly registered under the 'Medical Act' shall be entitled to be registered in any colony, upon payment of the fees (if any) required for such registration, and upon proof, in such manner as the Colonial Legislature shall direct, of his registration under the said Act."

The case on behalf of the defendants was argued by Mr. Crooks in a very fair and candid spirit, admitting,

as of course was necessary, with the Federation Act before us, that if the Imperial Parliament distinctly legislate for us they can do so, notwithstanding any previous enactment or alleged surrender of the power of exclusive legislation on any subject. But it was ably urged that, as the subject of education was one in which the exclusive right was given to this Province, we should read the subsequent Imperial Act as not interfering with the right so granted.

To this it may be argued that where the Federation Act speaks of any such exclusive right, it means exclusive as opposed to any attempt to legislate by the Dominion Parliament.

But it appears to us that the language of the Imperial Act already cited is too clear for dispute. It declares pointedly and most distinctly that a person on its register shall be entitled to registration in any colony on payment of the fee (if any) required for such registration; and the definition of "colony" clearly includes Canada.

It is impossible for us to refuse to these clear words their equally clear interpretation. It must be borne in mind that at the date of Confederation the Imperial Act of 1858, with the general words "in any part of Her Majesty's Dominions," was in force, and that in the amending Act of 1868 the Imperial Parliament was legislating for over forty colonial possessions of Great Britain, and not merely for the British Isles.

It was hardly, in any view, an unreasonable assumption that for such a diversified empire, with so many colonies in various stages of national development, to take it for granted that a scientific qualification deemed sufficient for the advanced civilization of the parent State would be willingly accepted as sufficient for the empire at large.

It would have been, perhaps, not free from reasonable

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objection to have admitted to practise in England every person said to be qualified by any local law in any of the colonies. It would have been, perhaps, painfully invidious to except any one or more of the Queen's possessions, on the assumption that it had attained a higher level in medical education.

We do not think it necessary to discuss a question suggested rather than argued, as to the right of defendants to require persons claiming registration without examination to pay any increased fee demanded by them.

Mr. *Crooks* did not press any such point, and we do not feel inclined to impute to a body of gentlemen representing the medical profession in Ontario, standing so deservedly high in public repute, a desire to do more than to ascertain their legal rights, and not to evade their performance, or induce submission to an unlawful requirement, by the imposition of what may be termed "differential duties" against those who may seek to make this country their home, on the faith of the general law of the empire.

*Rule absolute.*

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ONTARIO COURT OF QUEEN'S BENCH.

JONES v. THE CANADA CENTRAL RAILWAY COMPANY.

[Reported 46 U. C. Q. B. 250.]

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 Oct. 11;  
 Nov. 1.

*Private Act—Effect of—Jurisdiction of Local Legislatures—Domicile of party affected.*

Provincial Legislatures are not restricted to legislation respecting property such as bonds held in the Province, and where debts or other obligations are authorized to be contracted under a local Act, passed in relation to a matter within the power of the Local Legislature, such debts may be dealt with by subsequent Acts of the same Legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province.

Declaration: That the Brockville and Ottawa R. W. Co., on 2nd July, 1860, by their "debenture transferable," overdue, issued under 23 Vict. c. 109, in consideration of £100 stg., promised to pay to bearer £100 stg. 20 years after 1st July, 1860; and afterwards said R. W. Co., by an Act of the Dominion of Canada, became amalgamated with defendants, and defendants thereby became liable to plaintiff (the bearer) for the amount of the said debenture; and although plaintiff became holder of said debenture before this action, neither the B. & O. R. W. Co., nor defendants as their successors, paid the same or any part thereof.

Third plea: That after the alleged claim accrued, and before action, by an Ontario Act entitled "An Act for the conversion of the ordinary Bonds and old Stock of the Brockville and Ottawa Railway Company into reduced new Stock, and for other purposes," the liability of the said B. & O. R. W. Co. to pay said debentures in

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money wholly ceased; that said debenture was one of a certain class of bonds designated in said Act as ordinary bonds, and it was provided by said Act that, from and after the passing of said Act, the holders of such ordinary bonds should have no claim upon said B. & O. R. W. Co., at law or in equity, in respect of said bonds, except for the conversion of said bonds into new paid-up stock in the capital of said B. & O. R. W. Co., as authorized by said Act, at the rate of twenty-five cents in the dollar on the amount of such bonds and of the coupons thereto attached; and said B. & O. R. W. Co. always were ready and willing to issue to said ordinary bondholders certificates of proprietorship of fully paid-up shares in new stock proportionate to the amount of said bonds. And by the Act of Parliament of Canada in the declaration mentioned, whereby the B. & O. R. W. Co. became amalgamated with defendants, it was amongst other things enacted that the stock of the amalgamated company, these defendants, should be allotted to the stockholders of the said two companies, in the case of the B. & O. R. W. Co., at the par value of the existing stock of said company, including the stock which was due to the former creditors of said company, and had not been received by them in exchange for their claims; and the defendants, since the said amalgamation, have always been ready and willing, on surrender of said debenture in the declaration mentioned, to allot to the plaintiff, or other holder of said debenture stock in defendants' company, at the par value of the stock of the said B. & O. R. W. Co. existing at the time of said amalgamation, but neither plaintiff nor any other holder of said debenture has ever demanded the said stock.

Replication: That the Ontario Act mentioned in said plea was null and void and of no effect, so far as plaintiff's rights were concerned, upon said debenture transferable,

because said Act was *ultra vires* said Legislature, inasmuch as in the said Act the plaintiff, or the holder of the said debenture transferable at the time of passing of said Act, was not specially named therein, nor a petitioner for or a party to said Act, which was in the nature of a private Act, nor were their or either of their rights specially taken away or limited by said Act, or under the Act of the Parliament of Canada mentioned in said plea. That at the time of the passing of the Ontario Act, said debenture transferable was payable at London, England, and was there domiciliated, and the holder or bearer thereof resided in England, beyond the jurisdiction of the Legislature of Ontario, and said holder or bearer of said debenture transferable had no notice or knowledge of said Act, and was not a party to the passing of said Act, and said Act did not affect, nor did the subsequent Act of the Parliament of Canada affect or limit any rights upon said debenture transferable or any property therein.

Demurrer: That the Ontario Act was not *ultra vires*, and the rights of the plaintiff as holder of said debenture transferable, or ordinary bond, were determined and fixed by said Act; and the liability of the defendants in respect to said debenture transferable, or ordinary bond, was also thereby determined, and plaintiff was limited to the rights thereby given.

Mr. Watson for the demurrer. The Canada Central, originally the Brockville and Ottawa Railway, is a local undertaking within the meaning of sub-s. 10, s. 92, of the Confederation Act. The Provincial Act in question is therefore *intra vires*.

Mr. G. A. Mackenzie contra. Though the Act may be *intra vires* as to holders of bonds living in the Province at the time of its passing, it is *ultra vires* as to those not living in the Province. The bond in question was held by

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a resident of Great Britain at the time the Act was passed; it was therefore not "property" or a "civil right" within the Province. See *Re Goodhue* (1), *In re Ewin* (2); *Sill v. Worswick* (3).

OSLER, J.\*:—

The Brockville and Ottawa Railway Company was incorporated by Acts of the Parliament of the old Province of Canada, 16 Vict. c. 106, and 18 Vict. c. 183.

By 23 Vict. c. 109, a special form of debenture was provided for an authorized debenture issue of £350,000 stg., referred to in subsequent legislation as "ordinary bonds."

These debentures were, by the Act, declared to be a charge upon the lands, tolls, and revenues of the company next after a preferred charge in respect of a loan made to the company by the municipalities through which the road passed.

They were made payable twenty years after the date mentioned therein, with interest at the rate of six per cent. per annum, to be paid on the first days of January and July in each year, upon presentation and surrender of the proper coupons thereto attached at the office of \_\_\_\_\_, in the city of London, England.

The debenture mentioned in the declaration is one of these debentures.

By the 27 Vict. c. 57 (1863), the preamble of which recites that the company, by reason of financial embarrassments, had for a long time been unable to pay the interest upon their mortgages and bonds, and that it was expedient to provide by legislation for the reorganization of the company, whereby the extension of the road might be secured and a sacrifice of the interests of the municipal, bond, and other creditors avoided, the company were

(1) 19 Grant, p. 454.

(2) 1 C. & J. 156.

(3) 1 H. Bl. 690.

\* This case was heard by Osler, J., sitting alone.

authorized to issue preferential extension bonds for £60,000 stg., to be applied to the special purposes mentioned in the Act, and to execute a mortgage upon the railway and works to secure such bonds, which should form the first charge thereon, next after and subject to the claims of the municipalities.

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The railway being, at the time of the confederation of the Provinces, a local work or undertaking situate wholly within the Province of Ontario, the power to legislate in respect of it after that time belonged to the Provincial Legislature, which, in 1868, passed an Act (31 Vict. c. 44) intituled, "An Act for the conversion of the ordinary bonds and old stock of the Brockville and Ottawa Railway Company into reduced new stock, and for other purposes." The preamble recited the 27 Vict. c. 57, and that, owing to alleged default in payment of the interest on the preferential extension bonds, the trustee under the mortgage had taken possession of the railway, and was about to foreclose and sell the road in consequence of such default, and that under that Act all outstanding liabilities of the company had been or were convertible into ordinary bonds of the company, ranking next after the preferential extension bonds; that the interest on the ordinary bonds of the company was accumulating, and a financial reorganization of the company sought; that it had been mutually agreed by and between the preferential bondholders and a large majority in value of the ordinary bondholders, and by three-fourths in value of the shareholders, that such reorganization should be carried into effect upon the terms of the memorandum set forth in the preamble; and that an Act of the Legislature was required to carry such agreement into effect.

The Act then (sec. 1) reduced the capital stock of the company to \$500,000, or such other sum, more or less, as should be sufficient to cover the outstanding ordinary

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bonds, or claims convertible into such, and the existing paid-up stock converted at the rate of ten cents in the dollar.

By section 2, ordinary bonds held by preferential extension bondholders at the date of the passage of the Act of 1863, were converted into new paid-up stock, at the rate of fifty cents in the dollar on the amount of such ordinary bonds and coupons overdue thereon, and the remaining ordinary bonds, with overdue coupons, were converted into new paid-up stock, at the rate of twenty-five cents in the dollar.

Section 6 enacted that the conversion provided for should take effect immediately after the passage of the Act, and that the management and possession of the railway should, within four weeks thereafter, be restored by the trustee of the preferential extension bondholders to the company.

By section 8, the right of these bondholders to foreclose their mortgage, or otherwise to dispose of the road thereunder, was forever extinguished; and the 7th section enacted that from and after the passing of the Act the ordinary bondholders should have no claim upon the company, at law or in equity, in respect of these bonds, except for the conversion of the same into new stock.

The claim of the municipalities was not interfered with.

In the year 1874, Acts were passed by the Legislature of the Province and the Parliament of the Dominion, which authorized the transfer to the Canada Central Railway Company of the claim of the municipalities in satisfaction of the claim of that Company against the Province (see *Canada Central R. W. Co. v. The Queen*) (1), and the Brockville and Ottawa Company were authorized to issue bonds called preferential mortgage debentures for the amount of such liability, which debentures it was

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(1) 20 Grant, 273.

enacted should rank *pari passu* with the preferential extension bonds issued under the Act of 1863, and form with them a first charge upon the railway.

The last Act necessary to be referred to is 41 Vict. c. 36, D. (1878), intituled "An Act to amend the Act incorporating the Brockville and Ottawa and the Canada Central Railway Companies, and to provide for the amalgamation of the said Companies."

This Act (sec. 1) declared the Brockville and Ottawa Railway to be a work for the advantage of Canada.

Section 2 empowered the two companies to amalgamate, under the name of the Canada Central Railway Company.

Section 4 invested the amalgamated company with all the rights, powers, franchises, and property of both companies, specified in, and in them vested by, the several Acts relating to the companies; and provided that the amalgamated company should be liable for all the debts, duties, and obligations of both companies.

The 7th section declared that the existing preferential liabilities and liens should not be affected; and the 8th provided that the stock of the new company should be allotted to the stockholders of the old companies—in the case of the Brockville and Ottawa Company, at the par value of the existing stock of that company, including the stock, if any, due to the former creditors of the company, and which had not been received by them in exchange for their claims.

The plaintiff sues as the holder of one of the ordinary bonds issued under the Act of 1860, and the defendants in effect say that the liability of the Brockville and Ottawa Company thereon was extinguished by the Ontario Act of 1868, and that they are and have always been ready and willing to exchange such bond for reduced new stock, as provided by that Act and the Dominion Act of 1878.

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In the third replication the plaintiff contends that the Act of 1868 is void and of no effect as regards him, and is *ultra vires* the Ontario Legislature, because such Act is in the nature of a private Act, and the plaintiff, or the holder of the debenture at the time of passing the Act, was not specially named therein, or a petitioner for or a party to the Act, nor were his rights specially taken away or limited by that Act or the Dominion Act of 1878.

The fourth replication alleges that the Act is *ultra vires*, because, at the time it was passed, the debenture in question was payable in London, England, and was there domiciliated, and the holder and bearer thereof then resided in England, beyond the jurisdiction of the Ontario Legislature, and had no notice of and was not a party to the passing of the Act.

These are the replications demurred to.

The question really intended to be raised by the third replication is not, as it rather inaccurately states, whether the Act of 1868 is *ultra vires* the Ontario Legislature, but whether the plaintiff is brought within its operation or affected by its provisions.

I must say that it seems to me quite clear that he is.

One of the expressed objects of the Act is, to provide some relief for the ordinary bondholders, and to save for them, if possible, something out of the wreck of a hopelessly insolvent concern. The best way, in the opinion of the Legislature, to effect this was to validate the scheme which the large majority in value of such bondholders had approved of; and this they accordingly profess to do by the Act in question.

Their power to do so, if otherwise exercised within the limits of the Confederation Act, was absolute; and the plaintiff, who is an ordinary bondholder, cannot, in my opinion, impeach it.

The question raised by the fourth replication is a more serious one, and I would gladly have referred it to the full Court had I been at liberty to do so, as a decision affecting the powers of either Legislature under the Constitutional Act ought to have all the weight it would derive from being the opinion of the full Court, or of the Court of Appeal. But, as I am now obliged to decide all matters coming properly before me, I must dispose of this question here, with the satisfaction, however, of knowing that if my opinion is erroneous, it can speedily be corrected elsewhere.

It is argued that the Act is *ultra vires* as regards the plaintiff, because, at the time it was passed, the debenture was domiciliated out of the Province of Ontario, *i. e.*, in England, where the holder thereof resided, and therefore was not, within sec. 92, sub-sec. 13, B. N. A. Act, property or civil rights within the Province so as to be the subject of legislation by the Provincial Legislature, and many authorities were cited to enforce the application of the maxim, *mobilia sequuntur personam*. Some of them are referred to, and their result expressed by Strong, V.C., in *Re Goodhue* (1): "It has been determined in the English Courts, by decisions never reversed, and which must, as I conceive, give the law to us, however much foreign jurists and writers on international law have differed on the point, that the locality of a debt is at the domicile of the creditor."

The rule, however, is not of universal application, and in the case of *Nickle v. Douglas* (2), on a question arising as to the construction of the Assessment Act, it was held not to govern.

I may here refer to the recent case of *Re Vigalas Settlement Trusts* (3), as confirming the view of the learned

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(1) 19 Grant, p. 454; *ante*, p. 574. (2) 35 U. C. Q. B., 126; 37 U. C. Q. B. 51.

(3) 7 Ch. D. 351.

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Chancellor, now the Chief Justice of Ontario, in *Re Goodhue* (1), that where property is settled in trustees the governing domicile is that of the trustees and not of the beneficiaries.

The argument for the plaintiff, pushed to its legitimate extent, would, if well founded, go a long way to minimise the powers of the Legislature in respect of Provincial railways or other works. For the purpose of financial operations, of raising means to construct, equip, maintain, or extend the road, the bonds or debentures of the concern are frequently, and I suppose as a rule, made payable abroad. Equally, as a rule, it has unfortunately been found necessary, in order to avert the total loss of their capital by the original, or the first, second or third preference bondholders, to carry on the work, or procure additional capital, by rearranging, consolidating, and postponing or reducing the bonded debt. The continued existence of the road, either as a going concern, or one in which the original creditors shall any longer have an interest, may depend upon some scheme of this kind being legalized by the Legislature, where it is not within the powers conferred by the charter of the company, or where the requisite consent of every creditor cannot be obtained. All Acts of this kind, whether they relate to railways or any of the other numerous undertakings incorporated or chartered by the Provincial Legislature, must, in one sense, affect property and civil rights out of the Province when any of the creditors of the company do not reside therein. Whether they defer, reduce, or entirely extinguish the debts they profess to deal with, is merely a question of degree. They must therefore be *ultra vires* as regards such creditors, and so practically useless, if sub-sec. 13 of sec. 92, B. N. A. Act, is the limit of Provin-

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(1) 19 Grant, p. 418; *ante*, p. 571.

cial powers, and the legal fiction or maxim already adverted to is applicable.

I hesitate to adopt so narrow a construction of the section.

To quote again from *Re Goodhue* (1), per Spragge, C.: "The true principle I take shortly to be that, under the Confederation Act, there has been a federal, not a legislative union; that to the Provincial Legislature is committed the power to legislate upon a range of subjects which is indeed limited, but that, within the limits prescribed the right of legislation is absolute."

One of the matters in relation to which the Provincial Legislature may make laws is local works and undertakings, with certain exceptions not affecting this case: s. 92, sub-s. 13.

The scope of these words, "in relation to," is extremely wide.

Property and civil rights within the Province is also one of the matters assigned exclusively to the Provincial Legislatures; yet it is well settled that the Dominion Parliament may legislate with respect thereto where it becomes necessary to do so for the purpose of legislating generally and effectually in relation to matters exclusively within their own legislative authority: *The Niagara Election Case* (2); *Valin v. Langlois* (3); *Cushing v. Dupuy* (4).

If the powers conferred upon the Provincial Legislature are to be effectually exercised, they must, I think, receive a not less liberal construction.

The Act of 1868 is certainly an Act relating to what was at the time of its passage a local work or undertaking, nor is it less so because it only deals with the debts and liabilities of the company.

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(1) 19 Grant, p. 418; *ante*, p. 570. (3) 3 Can. S. C. R. 1; *ante*, p. 158.  
(2) 29 U. C. C. P. 261. (4) 5 App. Cas. 419; *ante*, p. 252.



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If I am to hold that it is paralyzed merely because some or all of these debts were payable to creditors resident out of the Province, and were therefore not property or civil rights in the Province, I do not see that I can stop short of the conclusion that no legislation of this kind, of which, be it said, our statute books are full, can safely be obtained except from the Dominion Parliament.

I do not think the powers of the Provincial Legislature are so much circumscribed.

I am of opinion that where debts or other obligations arise out of or are authorized to be contracted under a local Act which is passed in relation to a matter within the powers of the Local Legislature, such debts or obligations may be dealt with or affected by subsequent Acts of the same Legislature in relation to the same matter, and this notwithstanding that by a fiction of law such debts may be domiciled out of the Province.

[The learned judge then referred to the case of *Gebhardt v. The Canada Southern R. W. Co.*, 21 Albany L. J. 352, as to which he was of opinion that had the action been brought in Ontario the Provincial Courts could not have adopted the conclusions arrived at by the New York Court.]

These are the questions arising for decision in the present case, and I have determined them in favour of the defendants.

*Judgment for defendants on demurrer.*

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## ONTARIO COURT OF QUEEN'S BENCH.

*Re* SQUIER.

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[*Reported 46 U. C. Q. B. 474.*]

Jan. 24, 27.

*County Court Judge—Charges of Misconduct—Enquiry by Commission—Court of Impeachment.*

By the B. N. A. Act, 1867, s. 96, the Governor-General is authorized to appoint the Judges of the County Courts, and the Provincial Legislature of Ontario had no power to pass an Act authorizing the removal of County Court Judges by the Lieutenant-Governor for incapacity or misbehaviour, and had not power to pass an Act abolishing the Court of Impeachment, which existed in Canada before the B. N. A. Act, for the trial of charges against County Court Judges.

A County Court Judge may be removed by the Governor-General in Council under the Imperial Act 22 Geo. III. c. 75, but there is no power under that Act or the Con. Stat. C. c. 13, or under the common law, to issue a commission for a preliminary enquiry under oath with respect to such charges.

Mr. *McCarthy*, Q.C., moved on notice, dated 17th January, 1882, on behalf of Wilmot Richard Squier, Judge of the County Court of the county of Huron, for a writ of prohibition, prohibiting David B. Read, Esquire, Q.C., the commissioner appointed under a commission of His Excellency the Governor in Council, issued under the Great Seal of the Dominion of Canada, dated the 22nd of December last, from proceeding to examine or report upon the matters and things charged against the said judge, and from in any way proceeding under the said commission. The commission bore teste on the 22nd of December, 1881, and was issued under the Great Seal of Canada, and was directed to David B. Read, Q.C. It recited that by the Imperial Act 22 Geo. III. c. 75, among

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other things, it was in effect by the said statute enacted that if any person holding an office in any colony of Great Britain should neglect the duty of such office, or otherwise misbehave therein, it should and might be lawful to and for the Governor in Council to remove such person from such office. It also recited that certain members of the legal profession residing and practising in the county of Huron, in the Province of Ontario, had, by their petition to the Governor in Council, preferred certain charges against his Honour Wilmot Richard Squier, Judge of the County Court of the county of Huron, alleging neglect of duty and misbehaviour in his capacity as such judge, which charges were particularly set forth in such petition, a copy of which was annexed; and that the Governor in Council deemed it expedient that enquiry should be made into the said charges.

The commission then proceeded, and appointed the said David B. Read, the commissioner in that behalf, to examine into and report upon the matters and things so charged against the said judge, and particularly set forth in the said petition.

The commission concluded: "And we do hereby confer upon you, the said David Breakenridge Read, full power and authority of summoning before you any party or witness, and of requiring them to give evidence on oath orally or in writing (or on solemn affirmation, if they be parties entitled to affirm in civil matters), and to produce such documents and things as you, as such commissioner, may deem requisite to the full investigation of the matters into which you are appointed to examine; and we do require you, the said David Breakenridge Read, forthwith after the conclusion of such enquiry, to make full report to us touching the said investigation, together with a return of all or any evidence taken by you concerning the same."

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Under that commission, the commissioner, by his notice in writing dated the 6th of January, 1882, addressed to the said judge, required him to take notice that he, the commissioner, appointed Monday, the 16th of January, 1882, at the office of J. T. Garrow, barrister, at Goderich, between the hours of 10 A.M. and 4 P. M., to receive any answer in writing the said judge might wish to make to the charges contained and set forth in the paper to the said notice annexed, which answer was required to be left in an envelope addressed to the said commissioner at Toronto; and the judge was further required to take notice, that by virtue of the said commission the said commissioner had appointed Tuesday, the 24th of January following, at the Grand Jury Room in the Court House at the said town of Goderich, at the hour of 10 o'clock in the forenoon, to proceed with the investigation of the charges contained in the said petition, and to hear such evidence as might be offered in regard to the same, and to hear the answer and such evidence as the judge might adduce respecting the same, and the judge was thereby required to attend in person at the time and place last appointed.

The judge made affidavit on the 14th of the same month, that he was served with the said notice; that he believed the said D. B. Read intended to, and would unless prohibited therefrom by the writ of this Court, proceed at the time and place appointed to hold in a public manner a so-called investigation as stated therein, and call upon sundry persons then and there to give evidence, and permit such persons to make in a public manner, and under the colour of giving such evidence upon the said investigation, various calumnious and scandalous statements in reference to the charges annexed to the said notice; and he added that he entirely denied the right of His Excellency the Governor in Council to cause the

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issue of the said commission, or to authorize the said commissioner or any person to hold the so-called investigation ; and he protested against and objected to a gentleman at the bar, however eminent he might be and greatly to be respected, being deputed to hold, in the manner and form proposed, such an investigation as that intended into a matter of such gravity and public importance as that of the conduct of a member of the judiciary of the Province.

A copy of the commission of the judge was filed upon the motion, appointing him senior judge of the County Court of and for the county of Huron. It was tested the 30th of July, 1877, and was "to have, hold, exercise, and enjoy the said office unto you, the said Wilmot Richard Squier, during good behaviour and during your residence within the said county of Huron."

The learned counsel, in support of the motion, argued:—

The Con. Stat. U. C. c. 15, s. 3, declares the judges of the County Courts "shall hold their offices during good behaviour, but shall be subject to removal by the Governor for inability or misbehaviour, in case such inability or misbehaviour be established to the satisfaction of the Court of Impeachment for the trial of charges preferred against judges of County Courts."

The B. N. A. Act, s. 96, authorizes the Governor-General to appoint the judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.

Sec. 99: "The judges of the Superior Courts shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons."

The Court of Impeachment for the trial of charges against judges of the County Courts for inability or

misbehaviour in office was established by the 20 Vict. c. 58.

By 32 Vict. c. 22, s. 1, O., the Legislature assumed to repeal Con. Stat. U. C. c. 15, s. 2, which gave the Governor power to appoint County Court and Junior County Court judges.

By s. 2 of the same Act, s. 3 of the Con. Stat. U. C. c. 15, above stated, was also assumed to be repealed, and power was assumed to enact that County Court judges should hold their offices during pleasure, subject to be removed by the Lieutenant-Governor for inability, incapacity, or misbehaviour, established to the satisfaction of the Lieutenant-Governor in Council.

By the 33 Vict. c. 12, O., s. 2 of the 32 Vict. c. 22, was repealed, and this last enactment declared the County Court judges should hold office during good behaviour, but be removable by the Lieutenant-Governor for inability, etc.

By the 32 Vict. c. 26, O., the Legislature assumed the power to repeal the Con. Stat. U. C. c. 14, and thereby to abolish the Court of Impeachment.

The R. S. O. c. 42, s. 2, continues the 33 Vict. c. 12, s. 1, declaring County Court judges shall hold their office during good behaviour, but be removable by the Lieutenant-Governor for inability, incapacity, or misbehaviour, established to his satisfaction.

The remedy now pursued, to hold an enquiry into the conduct of the judge by commission, under the Imperial Act, recited in it, is not maintainable in law.

The learned counsel further argued that the powers of that Act can only be exercised when there is not a constituted government with the wide and liberal powers which are possessed by Canada. If, however, such power can in any case be exercised here, it can only be in the event of there not being any other remedy provided by

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the legislation of the country. Here there is a court specially created for the purpose of making such an enquiry. It is true the Ontario Legislature assumed, as just stated, to abolish it; but there was no such power vested in that Legislature, because it was a court established for the trial, not of Ontario officers, but of officers of the then Province of Canada, and who are now, and were at the time when that court was attempted to be abolished, officers of the Dominion of Canada. It is, therefore, notwithstanding the assumed power of the Ontario Legislature to abolish it, a court still in full force and operation for the trial of such matters as are the subject of investigation under this commission.

Again, the Imperial Act of 1782 applies only to cases in which patents have been issued in England, and not when they are issued in the colony. All the cases are of that description. *A sci. fa.*, it is laid down, may lie to repeal the patent. But whatever the remedy, the one which is now taken under the Imperial Act is not the proper one. Commissions which are legally issued may be *executed* in the manner in the Con. Stat. C. c. 13, and the 31 Vict. c. 38, D., mentioned; but these Acts do not authorize commissions *to be issued*.

He referred to Com. Dig., Officer K; Bac. Abr., Office M.; 17 U. C. L. J. N. S., pp. 400, 445. The Crown is not authorized to issue commissions to make enquiries of this nature without the sanction of Parliament. The Oxford University Commission, which will be referred to on the other side, is a case in point.

Mr. Robinson, Q.C., on behalf of the Dominion Government, shewed cause. In addition to the statutes already mentioned, 8 Vict. c. 13, s. 2, may be referred to, by which the County Court judges held their offices during good behaviour, removable on the address of the Legislative Council and Legislative Assembly. It may be that

the Act relating to the Court of Impeachment, Con. Stat. U. C., c. 14, is still in force, and the Ontario Legislature had not the power to repeal it, either under the B. N. A. Act, s. 92, or under any other of their powers. But the case of *Willis v. Gipps* (1), and *Montague v. The Lieutenant-Governor of Van Diemen's Land* (2), shew that the Imperial Act of 1782 applies to judges. It is not confined to cases in which the grantees of office have received their patents in England, and there can be no reason why the Act should not be equally operative when the patent of office has been granted in the colony. That Act may still be proceeded under, although there may be other remedies as well taken against the judge: See *Regina v. Amer* (3); *Ex parte Robertson, In re Governor-General and Council of New South Wales* (4); *Osgood v. Nelson* (5); *Musgrave v. Pulido* (6); *The Queen v. Coote* (7), and the memorandum of the Lords of the Council on the removal of Colonial judges, as stated in 6 Moore P. C., pp. ix. to xx. in the Appendix; Chitty on Prerogatives, 77. The Governor may, under the Act of 1782, and notwithstanding the Court of Impeachment, proceed under the commission. There is nothing in either statute to prevent it. Under the latter Act, sec. 4, the Governor does not and is not required to forward every case to the Court of Impeachment, but only if he "finds the same sufficiently sustained and of sufficient moment to demand judicial investigation by the Court of Impeachment." That seems to contemplate a preliminary investigation by the Governor. If the Governor had power to issue a commission under any authority which is vested in him, but had not the power to issue it under the Act of 1782, the recital in the commission

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(1) 5 Moore, P. C. C. 379.

(2) 6 Moore, P. C. C. 489.

(3) 42 U. C. Q. B. 391.

(4) 11 Moore, P. C. C. 288.

(5) L. R. 5 H. L. 636.

(6) 5 App. Cas. 102.

(7) L. R. 4 P. C. C. 599.



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of that Act may be rejected and the commission be supported under his own powers or under the prerogative authority. The case of the Oxford University commission shews an extraordinary difference of opinion among the most eminent counsel of the day as to the validity of that commission: Turner, Bethel, Keating, and Kenyon pronounced the commission to be "not constitutional or legal," and Dodson, Advocate-General; Cockburn, Attorney-General; and Page Wood, Solicitor-General, saw "no reason to doubt the perfect propriety of the commission on legal or constitutional grounds." If no statute authorizes the issue of the commission, and if the Crown have power to issue such a commission, the right of the Governor to issue it must depend upon the extent of his commission: *Musgrave v. Pulido* (1). He referred also to High on Extraordinary Remedies, sec. 782.

Mr. McCarthy, in reply. As it is conceded the Court of Impeachment is still a subsisting Court, this commission must fail. The 31 Vict. c. 38, D., although it may authorize an enquiry to be made into the administration of justice, will not authorize an investigation, under so general a phrase, to be made into the conduct of a judicial officer. There is no power to issue such a commission at the common law. The commission in effect creates a court to try the Judge of the County Court, and such a court is unconstitutional, and more particularly as he holds a freehold office: 5 Com. Dig. 214; 6 Petersdorff's Abr. 286 and note; High on Extraordinary Remedies, ss. 776, 777; *Re Hughes* (2).

WILSON, C.J.\*:—

It seems to be admitted by the able counsel who gave an opinion in favour of the validity of the Oxford

(1) 5 App. Cas. 102.

(2) 8 U. C. L. J. 203.

\* This case was heard by Wilson, C. J. C. P., sitting alone.

University Commission, that the Crown has no power to issue a commission by its prerogative, giving authority to the commissioner "to examine into and report upon the matters and things so charged against the said W. R. Squier, and summon before him any party or witness, and to require them to give evidence on oath, orally or in writing, or by solemn affirmation, and to produce such documents and things as the commissioner may deem requisite to the full investigation of the matters into which he is appointed to examine." In that case the commission was "for the purpose of enquiring into the state, discipline, studies, and revenues of our University of Oxford, and of all and singular the colleges of our said University;" and "to call" before the commissioners such persons as they may judge necessary, and to call for and examine all such books, etc., and to enquire of and concerning the premises by all other lawful ways and means whatsoever. And the counsel whose opinions were in support of that commission said, (1) commissions to impose burdens by the sole authority of the Crown; or (2) armed with power of fine and imprisonment; or (3) to hear and determine offences contrary to law; "and (4) commissions to hear and enquire into offences without determining them, unknown to and contrary to the law," were the kind of commissions referred to in the opinion given against the validity of the commission then under consideration, and not mere commissions of enquiry such as that one was. And it seems to be admitted that the kinds of commissions above referred to, excepting mere commissions of enquiry, were not valid in law: the blue book referred to in the report of the commissioners on the University, printed in 1852, presented to Parliament. That commission I find to have been discussed in 46 Law Mag. 79, and in 15 Jur., 2nd part, p. 185. The Crown would not withdraw that commission, although requested

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so to do by the university. In this case the commission is to make inquisition into the conduct of the County Court Judge, and for that purpose the commission creates a species of court not warranted by the common law, and ranges under the 4th class above enumerated.

With reference to commissions of enquiry, but not to hear and determine, it is said in 12 Co. 31, it "is against law, for by this a man may be unjustly accused by perjury, and he shall not have any remedy. . . And no such commission ever was seen to enquire only, *i. e.*, of crimes."

The right to issue this commission must therefore rest upon some statutory authority. If the Queen cannot herself issue a commission of this nature, it is very certain she cannot confer power upon the Governor-General to grant such a commission in her name.

By the 22 Geo. III. c. 75, it is enacted, sec. 1, "That no office to be exercised in any colony or plantation . . . shall be granted or grantable by patent for any longer term than during such time as the grantee thereof or person appointed thereto shall discharge the duty thereof in person and behave well therein." Sec. 2, "If any person holding such office shall be wilfully absent from the colony or plantation wherein the same is or ought to be exercised without a reasonable cause, to be allowed by the Governor and Council, or shall neglect the duty of such office, or otherwise misbehave therein, it shall be lawful for the Governor and Council to amove such person from any such office," with right of appeal to the party aggrieved to Her Majesty in Council.

There have been several cases of amotion under that Act. *Willis v. Gipps* (1) is one of them.

In that case the judge was appointed by Her Majesty, under the Imperial Act 9 Geo. IV. c. 83, one of the

judges of the Supreme Court of New South Wales by warrant under the Privy Seal and sign manual, whereupon he went to New South Wales and received his patent under the seal of the colony.

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By stat. 4 Vict. No. 22, of the Local Legislature, the Governor was empowered to appoint one of the judges of the Supreme Court to reside in the district of Port Philip, and Willis, the appellant, was appointed such resident judge for that district, by patent under the seal of the colony, on the 8th of February, 1841.

Afterwards the Governor brought before the Executive Council of the colony certain complaints against the appellant for alleged misbehaviour in his office of resident judge at Port Philip, and the matter of complaint was proceeded on in Council on the 21st of December, 1842, and on the 16th, 17th, and 20th of January, 1843. No notice was given to the appellant of the accusations preferred against him, nor of the proceedings of the Governor and Council thereon; and on the 24th of June, 1843, the appellant was amoved from his office of resident judge at Port Philip, and from his office as one of the judges of the Supreme Court. The decision was, the Governor and Council had power to amove the judge, and there were sufficient grounds for his amotion; but as he had not been heard against his amotion, the order of the Governor and Council amoving him was reversed. In that case the Governor and Council made the enquiry into the charges.

In *Montague v. The Lieutenant-Governor of Van Diemen's Land* (1), the appellant was appointed a judge of the Supreme Court of New South Wales by patent under the Great Seal of Great Britain, to hold during pleasure.

On 23rd November, 1847, Mr. Young presented a peti-

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tion in the name of Mr. McMicken to the Governor, containing charges against the appellant in his office of judge. The day after a copy of the petition was sent by the Secretary for the colony to the appellant, with a request he would offer such explanations as he might think necessary.

On the same day the appellant sent his answer.

On the 3rd of December Mr. Young sent in his reply on behalf of his client, and on that day Mr. Young sent in another communication to the Governor, stating certain other charges, as solicitor to the Hobart Town Branch of the Bank of Australasia, against the appellant.

On the 10th of December the Secretary for the colony wrote to the appellant that the Executive Council were of opinion the petition of Mr. McMicken, of the 3rd of November, and the statement of the solicitor, of the 3rd of December, seriously affected his character and standing as a judge of the Supreme Court; and he called upon him to shew cause why he should not be suspended from office until Her Majesty's pleasure was known, and he particularly called the appellant's attention to several of the matters charged against him.

The appellant denied the power of the Lieutenant-Governor to suspend a judge from office, stating the functions of the court could not be carried on by the remaining judge, and that he would continue to act as a judge, and he requested the communication just made to him to be modified.

The Lieutenant-Governor refused to do so, and the appellant was informed his case would be brought forward for final decision upon Friday, unless he shewed cause why further delay should be granted him.

The appellant applied for and obtained further time till the 28th of December, when he transmitted a rejoinder explaining and justifying his conduct.

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The Lieutenant-Governor and the Executive Council, having before them the accusation and defence, came to the conclusion that the charges were proved, and that suspension was an inadequate sentence, and that the case came within the Act of 1782, and justified the appellant's amotion from his office of judge; and sentence of amotion was passed on the 31st of December, 1847.

The decision was that the Governor and Council had the right of amotion under the 22 Geo. III. c. 75: that notwithstanding the irregularity in proceeding for a suspension, and then directing an amotion, yet as no injustice had followed from such irregularity, a reversal of the order of amotion was not recommended.

In that case, also, the proceedings were carried on before the Governor and Council.

In *The Representatives of the Island of Grenada v. Sanderson* (1), the memorial was direct from the complainants to Her Majesty, and referred to the Privy Council.

In *Ex parte Robertson, In re Governor-General and Council of New South Wales* (2), the Judicial Committee of the Privy Council decided the 22 Geo. III. c. 75, did not apply to an office, though held under the Great Seal of the colony, during pleasure only, but to patent offices held for life, or for a time certain. When an office is held during pleasure the Judicial Committee will not enquire into an amotion, unless by the express command of Her Majesty.

In *re Grant* (3), the appellant was Master, Accountant-General and Examiner in Equity in the Supreme Court of Judicature at Fort William, Bengal; he was suspended by the Court. It need not further be referred to.

In *Cloete v. The Queen* (4), the proceedings against the

(1) 6 Moore, P. C. C. 38.

(2) 11 Moore, P. C. C. 288.

(3) 7 Moore, P. C. C. 141.

(4) 8 Moore, P. C. C. 484.

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Recorder of the District of Natal were also taken by correspondence before the Governor and Council, whereby the appellant was suspended, but that order was reversed by the Judicial Committee of the Privy Council.

The memorandum of the Lords of the Council on the removal of colonial judges, contained in 6 Moore P. C. N. S., Appendix ix. to xx., is a very important document. It states, "That although," as in the case of Mr. Justice Boothby, "the Legislature of South Australia had passed addresses to the Crown for his removal, that measure did not suffice as it would have done in England; and that although the Legislature might act as his accuser, it rested with the advisers of the Crown in England to dispose of the charges against him.

"All the forms of suspension or removal which are in use," the memorandum states, "lead by different roads to the same result, viz., a hearing before the Privy Council. When a positive motion has been made under Burke's Act, 22 Geo. III. c. 75, the appeal to the Queen in Council is *strictissimi juris*, being provided for by the statute itself."

They do not *recommend* the Local Legislatures presenting memorials to Her Majesty, because they are in the nature of original proceedings before the Judicial Committee, but recommend the proceedings shall be by investigation in the colony, and by suspension or motion there, with the right of appeal to the Privy Council. It appears then that the mode of procedure in all these cases under the 22 Geo. III. c. 75, was by enquiry and by examination before the Governor and Council, and not by commission, and not under oath.

Does the Imperial Act of 1782 authorize the Governor to issue such a commission as the one in question: that is, one to enquire into the conduct of a judge, and to call for witnesses and books, etc., and to swear the witnesses,

although the commissioner is not to try or determine the matters committed to him? I am of opinion it does not. The commission is a delegation of authority.

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In *Osgood v. Nelson* (1), it was held that the mayor and council of the City of London, having the power of removal, might refer to a committee of their own body the task of examining into the complaint and receiving evidence upon it and reporting thereon; and that the reference to such committee was not a delegation of authority. The committee was to report to the Common Council, and that body was then to dispose of the case by a trial, if there was ground for a trial.

Besides, the Governor and Council have no power by the Imperial Act to put witnesses under oath, as has been done in this case. In the opinion of the law officers of the Crown on the Oxford Commission, they say as to a commission of enquiry such as that was, which was "a commission issued for the purpose of obtaining information in a matter of public concern without the assumption of any compulsory power, and whose sole authority is derived from the respect with which it may be expected that a royal commission will be treated by Her Majesty's subjects, more especially by public bodies and constituted authorities."

The commission now in question goes far beyond the commission referred to, and that one had no other authority than the respect which should be voluntarily given to it. The commission in question cannot in my opinion be supported under the Imperial Act, nor at common law.

If the commission is not sustainable under that Act, is it authorized by the Con. Stat. C. c. 13, and 31 Vict. c. 38, D.? The later of these two Acts is the same as the earlier one, excepting that the words "or the administra-

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(1) L. R. 5 H. L. 636.



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tion of justice therein," which are in the earlier Act, are not contained in the later Act.

It is under the earlier Act then this commission must be supported, if it is to be supported. That Act provides that: (Sec. 1) "Whenever the Governor-in-Council deems it expedient to cause enquiry to be made into and concerning any matter connected with the good government of this Province, or the conduct of any part of the public business thereof, or the administration of justice therein, and such enquiry is not regulated by any special law, the Governor may by the commission in the case confer upon the commissioners or persons by whom such enquiry is to be conducted, the power of summoning before them any party or witnesses, and of requiring them to give evidence on oath orally, or in writing (or on solemn affirmation, if they be parties entitled to affirm in civil matters), and to produce such documents and things as such commissioners deem requisite to the full investigation of the matters into which they are appointed to examine."

Sub-s. 2 provides for enforcing the attendance of witnesses and compelling them to give evidence, and for the punishment of false testimony as perjury; "but no such party or witness shall be compelled to answer any question, by his answer to which he might render himself liable to a criminal prosecution."

It is under this Act the commission has in part been framed.

It was argued that the Act gave no power to issue commissions, but only provided how they were to be executed when they could lawfully be issued.

I am of opinion it does confer the power to issue commissions for the purposes in the Act mentioned.

Then it was said a commission, if it can be lawfully issued under the Act, can only be for the purpose of causing, so far as this case is concerned, "enquiry to be

made into and concerning any matter connected . . . with the administration of justice" in the Province—that is, into *the subject* of the administration of justice; but that enquiry cannot be had or made into the conduct of any person or official connected with the administration of justice: that it may be made for the purpose of enquiring into the defects in the law, so that the administration of justice may be amended, but it cannot be made for the purpose of getting evidence against any one for his punishment, suspension, or amotion from office.

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The words of the Act are not so precise as they might have been to cover such a case as the present, but I am of opinion the fair construction of the Act will cover an enquiry into the conduct of any one connected with the administration of justice.

The first section provides that any *party* or witnesses may be summoned to give evidence; and sub-s. 2 provides that no such *party* or witnesses shall be compelled to answer any question which may render him liable to a criminal prosecution.

The Act contemplates that there may be *parties* besides witnesses, strictly speaking, who may be affected by or concerned in such enquiry; just as Mr. Squier, the County Court judge, is a party, and as the petitioners against him are parties.

But the objection, in my opinion, to the applicability of this Act in support of the commission is, that the Act only applies when "such enquiry is not regulated by any special law;" and there was from the year 1858, and still is, although the Ontario Legislature assumed, as before stated, to repeal it, a special law which expressly regulates the enquiry in question into the conduct of the County Court judge. I refer to the Con. Stat. U. C. c. 14, the Court of Impeachment Act, under which the necessary enquiry can be made.

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So that I am of opinion the commission cannot be supported under the Con. Stat. C. c. 13. Nor can it, I think, be supported under the Court of Impeachment Act, Con. Stat. U. C. c. 14, s. 4, although the Governor may call for further information and particulars before he considers the case to be sufficiently sustained and of sufficient moment to demand judicial investigation by the Court of Impeachment; but he cannot issue a commission to get that further information, and certainly it cannot be got under the oath of the witnesses or of the complainant. I may refer also to 1 Wm. & M. sess. 2, c. 2.

The County Court judges under the Act 2 Geo. IV. c. 2, s. 2, were appointed under the Great Seal of the Province. It is not said what their tenure of office then was. I think it was during pleasure.

The 4 and 5 Vict. c. 8, does not specify the tenure of office of County Court judges. I think they still continued during pleasure. The 8 Vict. c. 13, s. 2, made their tenure during good behaviour, removable on a joint address of the Legislative Council and the Legislative Assembly.

The 20 Vict. c. 58, which, among other things, established the Court of Impeachment, did away with the procedure of removing County Court judges upon the joint address of the two Houses of the Legislature, and gave, by section 10, judges of the County Courts a tenure of office during good behaviour, but removable by the Governor for inability or misbehaviour, when inability or misbehaviour was established to the satisfaction of the Court of Impeachment then created; and such continued to be their tenure of office (see Con. Stat. U. C. c. 15, s. 3) until the 32 Vict. c. 22, s. 2, O., which made their tenure during pleasure, removable by the Lieutenant-Governor for inability, incapacity, or misbehaviour established to his satisfaction. The tenure was again altered by the

33 Vict. c. 12. s. 1, O., which made it during good behaviour, removable, as before stated, by the Lieutenant-Governor for any of the causes mentioned, established to his satisfaction; and so it remains by the R. S. O., c. 42, s. 2.

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All mention of the Court of Impeachment has been dropped in these two last-named statutes, because the 32 Vict. c. 26, O., repealed, or, I should say, assumed to repeal, the Court of Impeachment Act.

These three last-named Acts are not maintainable, so far as they abolish the Court of Impeachment, which was admitted by Mr. *Robinson* in his argument, and assume to confer power on the Lieutenant-Governor to remove such judges for any cause.

Their tenure of office may therefore be described as that of judges during good behaviour, removable by the Governor for inability or misbehaviour, in case it is established to the satisfaction of the Court of Impeachment, just as it is described in the Con. Stat. U. C. c. 15, s. 3. And our own statutes should, I conceive, be amended in these respects.

As County Court judges are no longer removable by the Governor upon a joint address of the two Houses of the Legislature, when the Court of Impeachment was specially established to meet their case, it is a strong reason why their conduct should not be enquired into by commission under the Con. Stat. C. c. 13. If the joint address was done away with for the cause stated, the proceeding by commission to make enquiry is equally done away with by the Court of Impeachment Act, which certainly gives an enquiry regulated by a special law.

The modes of procedure which I conceive may be taken for the amotion of County Court judges in this Province are:

1. By proceedings taken under the 22 Geo. III. c. 75, by and before the Governor and Council.

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2. By proceedings carried on by and before the Court of Impeachment, upon the Governor transmitting the complaint made to him and all papers connected with it to the Chief Justice of Ontario, as president of the Court, under the Con. Stat. U. C. c. 14, s. 4.

3. By *scire facias*, when the conditions and terms of the patent have been broken: Com. Dig. Officer, K. 11: Bac. Abr., *Offices and Officers*, M.

4. Of course the Legislatures either of Ontario or of the Dominion can address Her Majesty to remove a judge, but such proceeding is the institution of an original cause before the Judicial Committee—Imperial Act 3 and 4 Wm. IV. c. 41, s. 4; but that course the Judicial Committee do not recommend to be adopted.

It is quite clear from the authorities quoted by Mr Todd in his very able work on Parliamentary Government in England, vol. ii. p. 729 *et seq.*, that notwithstanding the introduction of responsible government into many of the colonies, and the facilities afforded in the colonies for the removal of judges, the remedy given by the Imperial Act 22 Geo. III. c. 75, can still be adopted; and it may be adopted, as the cases shew, as well when the judge is appointed by a Colonial as by an Imperial patent.

As to the remedy by prohibition, see Com. Dig. Prohibition, A 1, A 2; Bac. Abr. Prohibition, vol. 6, p. 564, and Prohibition I, K; *Chabot v. Morpeth* (1); *In re Birch* (2); *Ex parte Smyth* (3). See also opinion of counsel for University, p. 26 of the Blue Book.

I am of opinion it may issue in this case to restrain the execution of this commission, as the commission is, for the reasons I have stated, not maintainable in law; but I shall reserve that part of the case, as it may be unnecessary absolutely to determine it, and will afford the parties

(1) 15 Q. B. 446.

(2) 15 C. B. 743.

(3) 3 A. &amp; E. 719.

an opportunity of knowing that my opinion is against the validity of the commission, to determine what course they may, and more especially the Crown authorities will take, or wish to take, concerning it.

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## ONTARIO COURT OF QUEEN'S BENCH.

1868.

Oct. 4.

THE QUEEN v. RENO AND ANDERSON.

[*Reported 4 Practice Reports (Ont.), 281.*]

*B. N. A. Act, ss. 65, 137—Administration of justice—Power of Provincial Legislature.*

An Act of the old Province of Canada authorized the Governor to appoint Police Magistrates; the Act was temporary: *Held*, that an Act of the Ontario Legislature, continuing the same in force, was valid.

In this case, which came before Draper, C. J., the prisoners had been committed to gaol by G. McMicken, Police Magistrate for the County of Essex, on an application for their extradition to the United States as having been concerned in the robbery of a train. An application was made for the discharge of the prisoners, on the ground, amongst others, that the Police Magistrate had no jurisdiction.

Mr. McMichael and Mr. O'Connor for the prisoners.

Mr. James Paterson for the Crown.

Mr. Albert Prince, Q.C., for the Express Company.

[The judgment, so far as relates to the present question, is as follows, p. 298.]

DRAPER, C. J.:—

The pressure of other business compelled me to defer giving judgment until some days after hearing the application, when I was a little startled to hear for the

first time an objection raised by the prisoners' counsel, that the Act 28 Vict. c. 20 had expired, and with it the authority of the Police Magistrate; and as there was then no time to examine into the enactments bearing on the point, the case stood over until this morning.

I have no doubt now that there is nothing whatever in the question raised.

The statute of Canada (28 Vict. c. 20) authorizes the Governor to appoint fit and proper persons to act as Police Magistrates within any one or more counties in Upper Canada. Section 3 defines their powers, and they clearly relate to the administration of justice.

This statute received the royal assent on the 18th of March, 1865, and was to continue in force for two years, and thence until the end of the next ensuing session of Parliament.

On the 29th of March, 1867, the Act creating the Dominion of Canada was passed, and it was brought into operation (by proclamation) on the 1st of July following. Among the powers which this statute assigns exclusively to the respective Legislatures of the Provinces is the administration of justice therein.

By section 65, all powers, authorities and functions, which before and at the union were vested in or exercisable by the respective Governors or Lieutenant-Governors of Upper Canada, Lower Canada, or Canada, shall, so far as the same are capable of being exercised after the union, in relation to the government of Ontario and Quebec respectively, be vested in or may be exercised by the Lieutenant-Governors of Ontario and Quebec respectively, etc. See also section 66.

By section 137, the words "and from thence to the end of the then next ensuing session of the Legislature, or words to that effect, used in any temporary Act of the Province of Canada, not expired before the union, shall

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be construed to extend to and apply to the next session of the Parliament of Canada, if the subject-matter of the Act is within the powers of the same, as defined by this Act, or to the next sessions of the Legislatures of Ontario and Quebec respectively, if the subject-matter of the Act is within the powers of the same, as defined by this Act."

By 31 Vict. c. 17, the Legislature of Ontario continued this statute [28 Vict. c. 20] until the first day of January, 1869.

I have no difficulty in holding that the statute 28 Vict. relates to the administration of justice, and is within the powers of the Legislature of Ontario; and if I were not free from doubt I could not, while not clear in an opposite conclusion, refuse to adopt the evident construction which the Legislature of this Province have put on section 137 in relation to this particular statute, by continuing it as already stated.

I do not think the statute of Canada, 31 Vict. c. 73, at all affects this conclusion.

[This Act, by sec. 1, gives the Governor in Council power to appoint Commissioners of Police within any one or more of the Provinces of Canada or within any one or more of the districts or counties in any Province, etc., and provides in sec. 4 that "Every Commissioner of Police appointed under this Act for the purpose of carrying out the criminal laws and other laws of the Dominion only, shall have and exercise within the Province or Provinces, or district or districts, or county or counties, or temporary judicial district, or provisional judicial district, of a Province for which he is appointed, all the powers and authority, rights and privileges by law appertaining to Police Magistrates of cities in the same Province, and all the powers and authority, rights and privileges appertaining to Justices of the Peace generally," etc.]

ONTARIO COURT OF CHANCERY.

THE ATTORNEY-GENERAL

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v.

THE NIAGARA FALLS INTERNATIONAL BRIDGE COMPANY.

[Reported 20 Grant, 34.]

*Information—Injury to Public—Proper officer to complain of.*

The Attorney-General of the Province is the officer of the Crown who is considered as present in the Courts of the Province to assert the rights of the Crown, and of those who are under its protection.

The Attorney-General of the Province, and not the Attorney-General of the Dominion, is the proper party to file an information where the complaint is not of an injury to property vested in the Crown as representing the Government of the Dominion, but of a violation of the rights of the public of the Province, even though such rights are created by an Act of the Parliament of the Dominion.

The Attorney-General of the Province is the proper person to file an information in respect of a nuisance caused by interference with a Railway.

Though the power of making criminal laws is vested in the Dominion Parliament the Attorney-General of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of Justice in the Province.

Demurrer for want of equity by the defendants, the Great Western Railway Company.

Mr. S. Blake, Q.C., and Mr. S. Barker in support of the demurrer.

Mr. Crooks, Q.C., and Mr. Moss, Q.C., contra.

STRONG, V.C. :—

This is an information filed by the Attorney-General of Ontario, at the relation of the Erie and Niagara Railway Company, conjoined with the bill of that com-

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pany, against the Niagara Falls International Bridge Company (a foreign corporation, incorporated by an Act of the Legislature of the State of New York), the Niagara Falls Suspension Bridge Company, and the Great Western Railway Company.

[The learned judge, after setting out the statements of the information, proceeded (p. 37) as follows:]

On the argument of this demurrer, two objections were urged: first, that the information was improperly filed by the Attorney-General for this Province, it being contended that the proper officer to complain of the injury to the public, which is the subject of the suit, was the Attorney-General for the Dominion; and secondly, that the agreements between the Bridge companies and the Great Western Railway Company were within the powers of the former companies.

The first objection is, in my opinion, without foundation. The Attorney-General files this information, not complaining of any injury to property vested in the Crown, as representing the Government of the Dominion, but in respect of a violation of the rights of the public of Ontario. The Attorney-General of this Province is the officer of the Crown, who must be considered to be present in the Courts of the Province to assert the rights of the Crown and those who are under its protection. If an *ex officio* information in respect of a nuisance caused by illegal interference with a railway, which is a public highway, were to be filed in a Court of common law, there would, I should think, be no doubt but that the Provincial Attorney-General was the proper officer to prosecute. Then on what principle could it make any difference that the railway in the supposed case, as the bridge here, belonged to a class of works, over which, as extending beyond the limits of the Province, the B. N. A. Act had conferred legislative powers on the Parliament of the Dominion? I can discover nothing incon-

gruous or inconvenient in the Attorney-General for the Province being admitted to sue on behalf of the public, even in respect of the violation of rights created by an Act of the Parliament of the Dominion. So far from that being so, the whole system of the administration of criminal justice furnishes an analogy to the contrary. The power of making criminal laws is in the Legislature of the Dominion; but it has never been doubted that the Attorney-General of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of justice in the Province.

For the purpose of obtaining redress for any injury to, or for restraining undue interference with, public property vested in the Crown, for the purposes of the Government of the Dominion, I can conceive that it might be argued with much force that the Attorney-General for the Dominion should be admitted to sue by information. That, however, is a totally different case from the present. In the case of a public nuisance caused by an illegal obstruction of a railway, as I have already said, the Provincial Attorney-General would be the proper officer to prosecute in a Court of law. A Court of equity, however, would also lend its aid on an information being filed by the proper officer to restrain such a nuisance. Would it not be a strange anomaly that whilst the criminal information could be preferred by the Provincial Attorney-General, the information in the Court of Chancery must be filed by the Attorney-General of the Dominion? Such a conclusion would not result from the exclusive legislative power being given to Parliament, and there is nothing else in the Imperial Act which can be suggested as authorizing such a mode of proceeding. My judgment, therefore, is against that ground of demurrer.

[The remainder of the judgment, which relates exclusively to the second ground of demurrer, is omitted.]

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## ONTARIO COURT OF CHANCERY.

1878  
June 22.

BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE  
SCHOOLS OF BELLEVILLE v. GRAINGER.

[Reported 25 Grant, 570.]

*Separate Schools, legislation respecting—B. N. A. Act, s. 93.*

A Provincial Legislature may legislate in regard to separate schools, provided that the rights or privileges with respect to denominational schools which any class of persons had by law in the Province at the time of Confederation, are not prejudicially affected by such legislation.

The B. N. A. Act provides by sub-s. 3 of s. 93, that "Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education:" *Held*, that this enactment gives an appeal in respect of those decisions alone which are Legislative Acts or their equivalents, and not in respect of matters affecting merely the every-day detail of the working of a school.

In election matters, separate schools have the same right of appeal to a County Judge as public schools have.

The bill in this cause was filed on the 13th of February, 1878, by the plaintiffs, as the duly elected trustees of the Roman Catholic Separate Schools of Belleville for the year 1878. The bill alleged that the defendant Grainger, the secretary and treasurer of the Board for the year 1877, together with the other defendants, who pretended that they had been elected trustees of the said schools for the year 1878, claimed to be entitled to the custody of the books, papers, etc., the property of the

plaintiffs. The plaintiffs contended that the defendants were not duly elected, inasmuch as the pretended elections at which they alleged, they were elected were not held by the returning officers, by whom the municipal elections for the city of Belleville had been held for the year 1878, nor at the places at which the said municipal elections had been held as required by the existing law.

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In consequence of the claim of the defendants, proceedings were taken before the judge of the County Court of the county of Hastings, under the provisions of the statute in that behalf, in order to test the right of the defendants, and the said judge decided that the pretended election of the defendants was wholly illegal and void. Notwithstanding this decision, the defendants continued to act as trustees, and refused to deliver up the books and papers and other property of the Board to the plaintiffs.

The bill prayed, amongst other things, that the defendants might be restrained from assuming to act as trustees of the said schools, and that, if necessary, their pretended election might be declared illegal and void.

The plaintiffs gave notice of motion for an injunction in the terms of the prayer of the bill; which, on the motion coming on, it was agreed should be treated as a motion for decree.

Mr. *Bethune*, Q.C., and Mr. *Moss* for the plaintiffs.

Mr. *L. Wallbridge*, Q.C., and Mr. *Wells* for the defendants.

BLAKE, V.C.:—

[After examining the enactments bearing on the election of separate and other school trustees prior to Confederation, and shewing that some ambiguity existed respecting the time, place and mode of holding the election for trustees, s. 79 of Con. Stat. U. C. c. 64, being

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in apparent conflict with the preceding sections of that Act, the learned Judge continued as follows (p. 578):]

This election is governed by the law as it stood on the 31st of December, 1877, at which time a material change had taken place in the school law of this Province.

The "Public School Law" had been amended and consolidated by 37 Vict. c. 28, and the ambiguity as to the above referred to ss. 3, 20, 62, 63, 64 and 79 (of Con. Stat. U. C. c. 64) had been removed. The clause of the Separate School Act which governed the election in question appears as s. 28 of c. 206, R. S. O., and reads as follows: "After the establishment of any separate school, the trustees thereof shall hold office for the same period and be elected at the same time each year that the trustees of public schools are, and all the provisions of 'The Public Schools Act,' relating to the mode and time of election, appointments and duties of chairman and secretary at the annual meeting, term of office and manner of filling up vacancies, shall be deemed and held to apply to this Act." By this clause the mode of procedure as to rural districts set forth in the Public School Acts must be followed in the election of trustees under the Separate School Act in rural districts, and the mode of procedure pointed out as to urban districts in the Public School Acts must be followed in the urban districts under the Separate School Act.

The clause in the "Public Schools Act" to which reference is made is s. 59 of c. 204, R. S. O., and it is as follows: "In every city and town, on the second Wednesday in January, an election shall be held in every ward at the place of the last municipal election, and under the direction of the same returning officer and deputy-returning officers, and conducted in the same manner as an ordinary municipal ward election; but the voting shall be by open vote, and the provisions of the Acts respecting voting by ballot shall not apply to

such elections." The time, place and manner of holding these elections is thus completely provided for, and those clauses in the Act which caused the ambiguity prior to consolidation, are happily wanting in the enactment as we have it to-day.

It was further argued by the learned counsel for the defendants that the Legislature had no power to pass any law to interfere with the position or mode of election of trustees of separate schools, as settled by statute prior to Confederation, and s. 93 of the B. N. A. Act, 1867, was cited in support of this contention. It would be a most unfortunate result of this enactment if it were found that it precluded the remedying defects in, or improving the machinery for working out, the separate school system. The first sub-section of clause 93 says: "Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union." It is clear that it was not intended by this sub-section to preclude all legislation, for the third sub-section enacts that "Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education;" and further by clause 4 it is enacted that "In case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case

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require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section, and of any decision of the Governor-General in Council under this section." So that there is here laid down a system of appeal in case there be legislation by a Province injuriously affecting any right or privilege of the minority in relation to education; and also a system of appeal is awarded in case needed legislation be not had by the Provincial Legislature when required in relation to education; and power is given to the Parliament of Canada to make remedial laws in such cases. It is therefore clear that the Provincial Legislature has some power to legislate as to denominational schools; and it is scarcely possible to conceive a case in which it could and should more properly interfere than where, as here, it is asked to remove an ambiguity in the working of the Act, and to give to the separate schools the same class of machinery for carrying on its work as is given to the public schools—a machinery which, after much thought and many years' experience, is found to be the best and simplest we have yet had.

No protest has been lodged against this Act, no appeal has been presented to the Governor-General in Council, and as, on the argument of the motion, it could not even be suggested in what manner it could "prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province," I cannot conclude but that the statute is constitutional.

The remarks which I have made as to the removal of the ambiguity as to the mode of election, apply also to the removal of the difficulty which exists in dealing with ss. 25 and 72 of Con. Stat. U. C. c. 64, and s. 13 of 23 Vict. c. 49. The Legislature was as much justified in the one case as in the other in making plain by the subsequent enactment what was meant, and in allowing to

separate schools the same right of appeal to the County Court judge as was given to the public schools. The defendants appear to have accepted this, as being the true reading of the enactment, for they summoned the plaintiffs before the judge of the County Court, who investigated the matters presented to him connected with the election, and found in favour of the plaintiffs' election and against the defendants. I assent to the finding of the judge of the County Court.

In the present case the matters in difference have been presented to the forum chosen by the defendants, who now object to the tribunal they selected, the learned judge having found against them. This Court is not sitting in review of the conclusion arrived at by the County Court judge, but is merely applying the auxiliary relief without which the finding of the other tribunal would be nugatory. It is clear that this jurisdiction has not been withdrawn from this Court, wherever the right of appeal, if any there be from the County Court judge, may lie.

I cannot attach any weight to the argument of Mr. Wallbridge, that under the words "An appeal shall lie to the Governor-General in Council from any . . . decision of any Provincial authority," found in the B.N.A. Act, 1867, the persons interested in separate schools have the right to present such a difficulty as the present to the Governor-General in Council. The meaning to be attributed to the word "decision" is explained by the words which surround it. The word "Act," which precedes the word "decision," and the words "of any Provincial authority," which follow it, shew that the matters contemplated as those which should be presented to the supreme authority are such as are "Acts," or their equivalents, and not the mere every-day detail of the working of a school.

[The remainder of the judgment is omitted, the same not having reference to the present question.]

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## ONTARIO COURT OF CHANCERY.

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June 29.

CREDIT VALLEY RAILWAY COMPANY v. GREAT WESTERN  
RAILWAY COMPANY.

[Reported 25 Grant, 507.]

*Provincial Railway crossing Dominion Railway, approval required.*

Where it is necessary for a Provincial Railway in Ontario to cross a Dominion Railway, the Company desiring to effect such crossing must procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council of the Dominion; and the Railway Companies cannot, by agreement, waive this provision.

Demurrer for want of equity.

Mr. M. C. Cameron, Q.C., and Mr. A. Hoskin for the demurrer.

Mr. Boyd, Q.C., and Mr. Wells, contra.

PROUDFOOT, V.C.:—

A motion for an injunction in this case was intercepted by a demurrer to the bill.

The demurrer raises the question whether, where a Provincial railway in Ontario crosses a Dominion railway, it is necessary to procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council of the Dominion; and also, if that be so, whether the companies can waive this provision; and lastly, if they can waive it, have they done so in this case?

By the Dominion Act of 1872 (35 Vict. c. 65, s. 5), the Great Western Railway works were declared to be for

the general advantage of Canada, and subject to the 130th section of chapter 66 of the Consolidated Statutes of Canada, which prohibited it from availing itself of crossing powers over other railways without getting the approval of the Board of Railway Commissioners, for whom the Railway Committee of the Privy Council was substituted by section 28 of the Act of 1868 (31 Vict. c. 68, s. 28 *et. seq.* D.).

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By an Act of 1877 (40 Vict. c. 45), the powers as to crossings in the Act of 1868 were extended to railways incorporated under Provincial Acts, in any case in which it is proposed that they should cross a railway under the legislative control of Canada.

I apprehend there can be no question that this Act of 1877 is quite within the competence of the Dominion Parliament, as necessary and essential for the protection of the Dominion railways within their control; so that the approval of the Railway Committee is requisite before such a crossing can be enforced.

By the Revised Statutes of Ontario, c. 165, sec. 9, sub-s. 16, no railway company shall avail itself of the crossing powers (in sub-s. 15) without the approval of the Commissioner of Public Works; and by section 4, the Act applies to any railway subject to the legislative authority of the Province. The Credit Valley Railway Company was incorporated by the Ontario Statute 34 Vict. c. 38, and is therefore subject to this provision.

Hence it would seem that where a Provincial railway crosses a Dominion railway, the approval both of the Railway Committee of the Privy Council and of the Commissioner of Public Works must first be had.

The control exercised by the Legislature over railway companies is not merely for the benefit of the companies themselves—it is also for the protection of the public. The numerous provisions in the Railway Act of 1868—

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*e.g.*, preventing the opening of a railway till after a month's notice to the Railway Committee of intention to open it (s. 25);—for the examination of the railway prior to opening (s. 27);—for condemnation of a dangerous railway (s. 30);—powers to require permanent bridges for movable ones (s. 35);—powers in regard to the crossing of highways (s. 36);—requiring notice of accidents, etc., to be given (s. 39)—shew that regard for the public safety is a material ingredient in considering applications by one railway to cross the line of another, and that it is not merely a question of comparative cost or inconvenience to the companies. The provision requiring the approval of the authorities vested with these powers and duties is therefore not one that can be dispensed with by any agreement, express or implied, of the companies affected.

It is true that these provisions of the Railway Act of 1868, which applies to Dominion roads, do not seem to be repeated in the Revised Statutes of Ontario; but I have only referred to them as shewing what kind of consideration must necessarily be involved in any application to the Commissioner of Public Works,—not only the price of the crossing, and arrangements connected with its maintenance, but also the supreme question, the security and safety of the public.

It may be said that the approval of all the Railway Committee affords all the protection requisite for the public safety. Perhaps it does, but the Legislature have thought fit to require the additional protection of the sanction of another officer.

[The remainder of the judgment, which refers exclusively to the question whether there had been any waiver, is omitted.]

ONTARIO COURT OF CHANCERY.

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*Re* THE TORONTO HARBOUR COMMISSIONERS.

[*Reported 28 Grant, 195.*]

*Dominion property in Province—Law of Province, effect of.*

*Held*,—following the case of *The Commissioners of the Cobourg Town Trust*, 22 Grant, 377—that the Commissioners of the Toronto Harbour were entitled to compensation for their services, and this whether the harbour belonged to the Dominion or the Provincial Government ; as in the event of it being found to belong to the Dominion, it must be assumed that the Dominion Government intended the Commissioners to be subject to the law of the Province in which the trust was to be administered.

This was a petition presented by several of the Commissioners of the Toronto Harbour, to have an allowance fixed as compensation for their services in discharging the duties of such trust.

Mr. *Boyd*, Q.C., in support of the petition.

Mr. *Foy* and Mr. *Tupper* contra.

SPRAGGE, C.:—

This case is not distinguishable in principle from the case of *The Commissioners of the Cobourg Town Trust* (1), decided by my brother Proudfoot. I have perused the report of that case, and find that almost every paragraph of the judgment applies to the case before me.

The only argument advanced in this case that was not advanced in the case in 22 Grant, where the case was

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(1) 22 Grant, 377.

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argued by Mr. *Boyd* for the Commissioners, and by the present Chief Justice of Ontario against the allowance prayed for, is one now advanced by Mr. *Foy*, viz., that the Toronto Harbour is, under the B. N. A. Act, the property of the Dominion of Canada, and that it was for the Crown, if any compensation was to be made to the commissioners, to fix the amount; and *Leprohon v. Ottawa* (1) is cited for the position.

In the Cobourg case, the "harbour, wharf, piers, and appurtenances" were part of the subjects of the trust. The case was therefore open to the same contention—so far, at any rate, as they were concerned; and I apprehend that, assuming an argument which I might think entitled to be considered as of weight had been overlooked by counsel and by the Court (which I think unlikely), it would not be a sufficient reason for not following the decision.

Mr. *Boyd* contends, at any rate, that the Toronto Harbour is not the property of the Dominion of Canada; that it is only such public works enumerated in schedule 3, as were the property of the Province, that were made the property of the Dominion; and that the Toronto Harbour, like the Cobourg Harbour, was and is vested in commissioners. I do not think it necessary, however, to decide that point, for the judgment in the Cobourg case decides that the trust is not a purely honorary one, and that the commissioners are entitled to be compensated for their services. Then why is it that the Act to provide for allowances to trustees does not apply to such a case, even if Mr. *Foy* be right as to the property in the harbour being in the Dominion? The Crown, as represented by the Dominion Government, has not fixed the amount of compensation, and therefore its being fixed by another authority is no interference with any Act of

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(1) 2 App. R. 522, ante p. 592.

the Dominion Government, and the case of *Leprohon v. Ottawa* does not apply.

Then, further, we find in the Toronto Harbour Act, 13 and 14 Vict. c. 80, provision made for the application of the tolls and revenues to be received by the commissioners. "First, to the payment of all reasonable expenses of collecting the same and of managing the said harbour and works, and keeping the same in efficient repair." These words, in a will or other private instrument creating a trust involving the duty of management of the subject of the trust, would indicate an intention on the part of the creator of the trust that the trustee should, as the law now stands, receive compensation for his services, as part of the reasonable expenses of managing the trust estate. The Dominion Government, legislative or executive, which must, of course, be assumed to be cognizant of the law of this Province in relation to compensation to trustees, has not thought fit to interpose its authority—assuming that it has authority—but has left the question of compensation to be governed by the law of the Province in which the trust is to be executed. If, therefore, the harbour of Toronto be Dominion property, as contended by Mr. *Foy*, its being so is not, in my opinion, against the Trustee Compensation Act applying to the case.

[The remainder of the judgment is omitted, the same not having reference to the present question.]

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## ONTARIO COURT OF CHANCERY.

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SMITH v. THE MERCHANTS BANK.

[Reported 28 Grant, 629.]

34 Vict. c. 5 (D.).—*Powers of Dominion Parliament—Property and Civil Rights—Trade and Commerce—Banking.*

The Dominion Parliament has power to legislate with respect to property and civil rights, so far as necessary for the exercise of its jurisdiction over the subjects assigned to it by the B. N. A. Act.

Per Spragge, C.: The Dominion Act 34 Vict. c. 5, s. 46, which authorizes the transfer of warehouse receipts to banks by direct endorsement, is within the powers assigned to the Dominion Parliament, and is valid.

The bank (defendants) had discounted for a trading firm, on the understanding that a quantity of coal purchased in the United States by the firm should be consigned to the bank, and that the bank would transfer to the firm the bills of lading, and should receive from one of the members of the partnership his receipt as a wharfinger and warehouseman for the coal as having been deposited by the bank, which was accordingly done. The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents, and filed a bill impeaching the validity of the receipt.

The cause came on to be heard at the Spring sittings of 1880 in Toronto.

Mr. McCarthy, Q.C., and Mr. Kingsford for the plaintiff.

Mr. C. Robinson, Q.C., and Mr. J. F. Smith for the defendants.

SPRAGGE, C.:—

[After disposing of an objection that the member of the firm by whom the receipt was given was not a warehouseman, the learned judge proceeded as follows, p. 697:—]

Another objection is, that the warehouse receipt is for coal *received from the bank*, the Act of 1859, 22 Vict. c. 20, authorizing only the advance of money by the bank upon the security of a receipt given by a warehouseman, and by *endorsement* thereon, by the owner or person entitled to receive the cereal or other thing deposited, transferred to the bank, and it was held in the *Royal Canadian Bank v. Miller* (1), in appeal, that the statute must be strictly pursued, and that a receipt direct to a bank was not authorized by the Act.

By the later Act, 34 Vict., the Act of 1859 is repealed, and it is not required by the later Act that warehouse receipts should reach the bank by endorsement only, as was interpreted to be the meaning of the former Act. The later Act, however, is since Confederation, and it is contended that the provision in question is an interference with the functions of the Local Legislature of Ontario, to which is committed by the B. N. A. Act the duty of legislating in relation to "property and civil rights in the Province." On the other hand, among the powers of the Parliament are: "The regulation of trade and commerce," and "banking, incorporation of banks, and the issue of paper money," and legislation upon all matters not assigned exclusively to the Legislatures of the Provinces.

Legislation upon trade and commerce, and upon banking, must necessarily affect to some extent property and civil rights. Legislation upon property and civil rights, in the abstract, is committed to the Provincial Legislatures; but where they are affected only by the legislation

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of the Dominion Parliament upon subjects upon which the Parliament has express authority to legislate, it cannot be an invasion of the functions of the Provincial Legislature for the Parliament so to legislate. To hold otherwise would be to nullify the powers of Parliament, not only in its legislation upon the two subjects to which I have expressly referred, but upon many other subjects which are made expressly subjects of its jurisdiction; not certainly less than one-half of the twenty-nine subjects in which exclusive legislative authority is given to the Dominion Parliament. I agree with what was said by Wilson, C.J. (then a judge of the Court of Queen's Bench), upon this point in *Crombie v. Jackson* (1).

[The remainder of the judgment is omitted, the same not having reference to the present question.]

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(1) 34 U. C. Q. B. p. 579; ante, p. 685.

ONTARIO COURT OF COMMON PLEAS.

CHURCH v. FENTON.

1878

[Reported 28 U. C. C. P. 384.]

*Indian lands—Power to tax—B. N. A. Act, s. 91, sub-s. 24.*

Those "lands reserved for the Indians," which by s. 91, sub-s. 24, of the B. N. A. Act, are placed under the exclusive legislative jurisdiction of the Parliament of Canada, are those Indian lands only which have not been surrendered by the Indians, and have been reserved for their use, and do not include lands to which the Indian title has been extinguished.

The Ontario Legislature has power to tax against a vendee unpatented lands which the Indians have surrendered for the purpose of being sold ; all unpatented lands, whether Indian lands or Crown lands, when once agreed to be sold, being upon the same footing as respects liability to municipal taxation.

Ejectment to recover possession of lot No. 22, in the 18th concession of the township of Keppel, county of Grey. Plaintiff claimed as patentee of the Crown under Letters Patent of the Dominion, dated 4th June, 1869. Defendant claimed as purchaser of the same at tax sales.

In 1854 a tract of land, of which the lot in question formed a part, was surrendered by the Indians to the Crown. At the trial before Patterson, J. A., without a jury, a verdict was entered for defendant, upholding both tax sales.

A rule *nisi* was obtained to set the verdict aside and enter the same for plaintiff.

Mr. J. Reeve shewed cause.

Mr. M. C. Cameron, Q.C., supported the rule.

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The judgment of the Court (Hagarty, C. J., and Gwynne and Galt, JJ.) was delivered by

GWYNNE, J.:—

The question upon which our judgment in this case depends is, was or was not the lot in question, which is a part of a tract of land surrendered by the Indians to the Crown in 1854, ratable for taxes, and liable to be sold for arrears of taxes at the date of the first sale of which evidence was given, and which took place in the month of November, 1870? If it was, our judgment must be for the defendant.

The British Crown has invariably waived its right by conquest over all the lands in the Province until the extinguishment of what the Crown has been pleased to recognise as the Indian title, by a treaty of surrender of the nature of that produced in this case; until such extinguishment of that title the Crown has never granted any of such lands.

Hence has arisen the expression—not, as it appears to me, strictly accurate, but which has been sanctioned by Acts of the Legislature—to the effect that certain lands are vested in Her Majesty in trust for the Indians; but whether Her Majesty be or be not a trustee of those lands cannot affect our determination of this case, for undoubtedly the legal estate in these lands, as in other Crown lands, until sold in accordance with the provisions of the law affecting them, is vested in Her Majesty.

Prior to the execution of this treaty or surrender, Her Majesty was seised of the lands therein mentioned in right of her Crown; but, by a usage which never had been departed from, the Crown had imposed upon itself this restriction, that it never would exercise its right to sell or lease those lands, or any part of them, until released or surrendered by the Indians, for the purpose

thereby of extinguishing what was called the Indian title ; but when, as in the case of this surrender now before us, the consideration to be paid for it was in the nature of an annuity by way of interest accruing from the proceeds of the sale of the lands, the lands being still retained under the control and management of the Indian Department, became designated " Indian Lands " to distinguish them from other Crown lands, the proceeds arising from the sale of which being applicable to the public uses of the Province, and constituting part of the Provincial revenue, came to be designated " Public Lands."

As early as 1837 was passed the Act 7 William IV. c. 118, intituled " An Act to provide for the disposal of the Public Lands in this Province," etc. That was an Act passed for regulating the management and sale of that portion of the lands vested in Her Majesty which consisted of Crown lands, clergy reserves and school lands, the proceeds arising from the sale of which were to be accounted for, as forming part of the public revenue, through the Commissioner of Crown Lands and the Receiver-General.

This Act did not affect the lands vested in Her Majesty in which the Indians were interested, either as lands appropriated for their residence, as to which there had been no treaty of surrender for the purpose of extinguishing the Indian title, nor lands as to which there had been a surrender of such title, but in the proceeds arising from the sale of which, the Indians being interested, the sale and management of them was retained in the Indian Department.

[The learned judge then reviewed at length the subsequent Acts of the Province of Canada before the union, by which Indian lands were placed in regard to taxation on the same footing as other public lands ; and as the result, he observed as follows, p. 398 :]

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I entertain no doubt that the land for which this action is brought, which was patented in June, 1869, in pursuance of a contract of sale entered into in 1858, was liable to taxation as non-resident land ever since the passing of the Act 27 Vict. c. 19.

But it is further contended that, by the B. N. A. Act, 1867, "Indians, and lands reserved for the Indians," being one of the subjects retained under the exclusive control of the Dominion Government, the Local Legislature had no power by the Assessment Act of 1869 to subject land of the nature of the land in question to taxation for municipal purposes. The point of this argument, as I understand, is that these lands being retained under the management of the Dominion Government, and the Local Legislature having repealed the Act of 1866, by which they may have been subjected to taxation, deprived itself of all power to levy such taxation, inasmuch as it had not, as is contended, any authority to re-enact clauses, although similar to those repealed, so as to affect lands which were, as it is said, withdrawn from their jurisdiction.

But lands surrendered by the Indians for the purpose of being sold, although under an understanding that the proceeds arising from their sale shall be applied for the benefit of the Indians, do not, in my judgment, come within the expression used in the twenty-fourth item mentioned in the 91st section of the B. N. A. Act, "Lands reserved for the Indians." That is an expression appropriate to the unsurrendered lands reserved for the use of the Indians, described in different Acts of Parliament as "Indian Reserves," and not to lands in which, as here, the Indian title has been wholly extinguished. True it is that Letters Patent for the land in question here, and for lands of that class, are issued by the Dominion and not by the Local Government;

but the necessity for that arises, in my judgment, not in virtue of or by force of the twenty-fourth item of the 91st section of the B. N. A. Act, but because lands of this description have not in terms been transferred by the Act to the control and management of the Provincial authorities by s. 92, the fifth subject enumerated in which as transferred to the Provincial jurisdiction, is the management and sale only of the public lands belonging to the Province, and the 91st section reserves exclusively under the jurisdiction of the Dominion all matters not coming within the class of subjects by the Act assigned exclusively to the Legislature of the Province.

But the 92nd section places under the exclusive control of the Provincial Legislature, municipal institutions, property and civil rights, and all matters of a merely local and private nature in the Province. It is only under these heads that the jurisdiction to assess or pass an assessment law for municipal purposes arises. At the time of the passing of the B. N. A. Act, the land sought to be recovered in this action was agreed to be sold; the agreement for sale vested in the contracting purchaser an estate and property in the land; incident to this estate and property arose certain civil rights, which were placed under the exclusive control of the Provincial Legislature. Assessment is but a mode of exercising that control. The purchaser's estate in that land was as much liable to the maintenance of municipal institutions, which are also placed under the exclusive control of the Provincial Legislature, as the estate of any other person in the Province holding real estate. It is only such estate that the assessment law really affects. The estate of the Crown is not sought to be prejudiced at all. Rating the land is but the *modus operandi*. If no contract for sale has been entered into, nothing can be sold. If a contract has been entered

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into, and letters patent have not yet issued, the estate of the person for the time being entitled by virtue of the contract may be sold, and by the law in force at the time of Confederation the Crown was obliged to recognise the title so acquired by a purchaser at the sale for the arrears of taxes. So soon as the land is granted by letters patent to the purchaser or to his assignee, by deed, *inter vivos*, or by will, or to his heir, the land itself might be absolutely sold.

Now, when the B. N. A. Act passed, this particular piece of land was, and had been since January, 1863, liable to assessment as non-resident land, and was so assessed. There was nothing in the Imperial Act which repealed the Act or Acts in virtue of which such liability arose, although the title was in the Crown; and although the sale and management of Indian lands remained in the Dominion Government, and the power to grant letters patent, still those lands, in so far as the right to levy rates was concerned, from the date of a contract of sale came under the authority of the Local Legislature. That was a matter affecting property and civil rights as they then existed; that liability, therefore, still continued after Confederation equally as before.

The condition of the lot, with reference to the contract of sale, was this: The sale took place in September, 1857. The first payment was made on the 15th February, 1858, and the last upon the 29th July, 1867, when the lot was paid for in full. From that time until the 4th day of June, 1869, when the patent issued to the plaintiff as the person representing then the original purchaser, although technically the fee was in the Crown, yet it was so only for the purpose of being conveyed by letters patent to the party entitled under the contract of sale. So that since the 29th July, 1867, the Crown had no interest whatever beneficially in the land in question.

The land was sold in 1870 for assessment made, and accrued in, and since, 1864; so that at the time of Confederation there was a liability incurred for taxes which, even if, as is urged, the Local Legislature had no right to impose or collect rates upon this land subsequently to Confederation, the estate, nevertheless, of the person for the time being entitled under the contract of purchase would in time have become liable to have been sold for the arrears due at the time of Confederation. But I must say that I entertain no doubt that the Local Legislature, after Confederation, had the right to amend and alter the assessment law without any prejudice to their right to assess and enforce payment of rates out of this particular ratable property, any more than out of any other ratable property. The land at the time of Confederation was liable to assessment for purposes—namely, the purposes of municipal institutions—which were placed under the exclusive control of the Local Legislature; and, in my judgment, involved in this control is the right to amend and alter the assessment law for municipal purposes, and so as to affect the rights and interests of every one having any estate in or title to land situate in the Province, saving always the estate and rights of the Crown. As to such right, the Local Legislature is successor of the old Legislature of Canada, and has in respect of this matter the same jurisdiction as that Legislature while it existed had.

If at the time of the sale in 1870 for arrears of taxes no patent had yet issued, a difficulty might possibly have arisen, notwithstanding that the Crown had no beneficial interest after the final payment on 29th July, 1867, if the deed executed to the purchaser at the sale for taxes had not correctly stated the title which was purported to be conveyed; but there is no place for such a difficulty here, for the land being patented since June, 1869, and

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having been liable for taxes assessed in and since 1864, it was the land itself which at the time of the sale was liable to be sold, as in all cases of patented lands sold for arrears of taxes.

As to this first sale—the only question having been whether the land being Indian land, and under the management of the Dominion Government, was liable to assessment at all, or, if liable before, did not cease to be upon Confederation? I am of opinion that the land was liable before Confederation, and continued to be so afterwards, and that the sale in 1870 effectually extinguished the plaintiff's title to the land then sold, unless the objection taken under the 128th section of the Act of 1869, for non-compliance with that section, and which is the sole objection to the sale of the two acres in 1873, invalidates both sales.

[The remainder of the judgment is occupied with the discussion of this last objection.]

*Rule discharged.*

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This judgment was affirmed by the Court of Appeal for Ontario, March 22, 1879. The judgment of the Court (Moss, C. J. A., Burton and Morrison, JJ. A., and Blake, V. C.) is reported 4 App. Rep. Ont., 159. With respect to the meaning and effect of the expression, "Lands reserved for the Indians," in the B. N. A. Act, s. 91, sub-s. 24, Chief Justice Moss said (p. 162):—I agree with the contention that upon the lands in question being surrendered by the Indians to the Crown, they were no longer lands held for or in trust for Indians, but became ordinary unpatented lands within the meaning of the Assessment Acts.

And at p. 164: But it is contended that because the B. N. A. Act has entrusted the exclusive management

and control of Indians and lands reserved for Indians to the Government of the Dominion, this sale is ineffectual. So far as that argument is founded upon a want of authority in the Provincial Legislature to re-enact, after Confederation, the provisions under which such lands might have been previously assessable, it is completely met by the remarks of Mr. Justice Gwynne, which I willingly adopt.

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Mr. Justice Burton said, at p. 170 :—I do not understand the objections founded upon the Confederation Act; the Local Legislature has not attempted to tax lands placed under the exclusive control of the Dominion Government and Legislature, assuming these lands since the surrender to come within the definition of "Indian Reserves," but treats the purchaser of such lands as the owner, and in his hands declares it liable to assessment.

The Local Legislature had this power before Confederation, and it is confirmed to them by the B. N. A. Act, the only distinction being that it is prohibited from taxing the property of the Dominion, or either of the other Provinces.

Vice-Chancellor Blake said, at p. 172 :—For the reasons assigned in the Court below, and in this Court, I think it is reasonably clear that the lands in question, being lands agreed to be sold, were liable to assessment.

The judgments of the Court of Appeal and of the Common Pleas were affirmed by the Supreme Court of Canada, June 21, 1880. The judgment of the Court (Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, JJ.) is reported 5 Can. S. C. R. 239. The judgments were short, and did not enter into the reasons

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affecting the constitutional question. The Chief Justice in his judgment did not expressly allude to it.

Mr. Justice Fournier said, at p. 245 :—The facts of this case raise the two following questions: 1st. Was the lot of land in question in this cause, forming part of the lands reserved and held by the Crown in trust for the benefit of the Indians, liable to be sold for taxes? . . .

As to the first question, I have no hesitation in saying that I entirely agree in the reasons given by Chief Justice Moss for concluding that the land in question was assessable, and consequently liable to be sold for arrears of taxes.

Mr. Justice Henry said, at p. 249 :—In consequence of the conclusion which I have arrived at in regard to the warrants under which the lands of the appellant were sold, it is unnecessary for me to discuss the question whether, under the circumstances, they, having been at one time Indian lands, were, when in his possession before his patent, liable to be taxed. I have, however, considered the subject, and have discovered strong reasons why they were not so liable, but as to that part of the case I need give no opinion.

The report states that Mr. Justice Taschereau "concurred in dismissing the appeal." Mr. Justice Gwynne also concurred. Neither judge went into the arguments on any of the points involved.

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The B. N. A. Act was not intended to curtail the paramount authority of the Imperial Parliament as respects any of the matters assigned by the Act to the exclusive jurisdiction of the Dominion Parliament, or of the Provincial Legislatures.

All that the B. N. A. Act intended to effect by s. 91, sub-s. 23, as to copyright, was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as the Act has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the Provincial Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion.

The Parliament of the Dominion has no greater power to deal with the subject of copyright than was possessed by Provincial Legislatures prior to Confederation.

The Imperial Copyright Act, 5 and 6 Vict. c. 45, was in force in Canada at the time of Confederation, and is in force in Canada still. It is not affected by the Canadian Copyright Act of 1875, which Act is also in force. *Smiles v. Belford* . . . 576

**COUNTY COURT JUDGE**—  
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By the B. N. A. Act, 1867, s. 96, the Governor-General is authorized to appoint the Judges of the County Courts, and the Provincial Legislature of Ontario had no power to pass an Act authorizing the removal of County Court Judges by the Lieutenant-Governor for incapacity or misbehaviour, and had not power to pass an Act abolishing the Court of Impeachment, which existed in Canada before the B. N. A. Act, for the trial of charges against County Court Judges.

A County Court Judge may be removed by the Governor-General in Council under the Imperial Act 22 Geo. III. c. 75, but there is no power under that Act, or the Con. Stat. C. c. 13, or under the common law, to issue a commission for a preliminary enquiry under oath with respect to such charges. *Re Squier* . . . 789

## **CRIMINAL LAW—**

1. *B. N. A. Act*, 1867, s. 92, sub-s. 8, 15—*Jurisdiction of Local Legislation*—*R. S. O. c. 181, s. 57.*

A Provincial Legislature cannot legislate with respect to offences of a criminal nature, except where such legislation is required for the direct enforcement of a law of the Province made in relation to a matter coming within its exclusive jurisdiction.

In legislating in regard to a matter within Provincial jurisdiction, a Provincial Legislature has no power to enforce its law by provisions respecting the trial and punishment of offenders in respect of acts which would be criminal offences at common law.

Section 57 of the Liquor License Act of Ontario, R. S. O. c. 181, by which it was provided that any person who, on any prosecution under that Act, tampered with a witness or induced or attempted to induce any such person to absent himself or to swear falsely, should be liable to a penalty of \$50, was therefore held to be invalid. *Regina v. Lawrence* . . . 742

2. *Crime?*—*What is a—36 Vict. c. 10, s. 4, O.—Evidence.*

An information under an Ontario Act, for selling intoxicating liquors on Sunday, was held to be so far a charge of a criminal character that the defendant could not be compelled to give evidence against himself. *Regina v. Roddy* . . . 709

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**DOMINION PARLIAMENT**—*Jurisdiction of—B. N. A. Act*, 1867, s. 108.  
 Under the B. N. A. Act, 1867, s. 108, read in connection with the third

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schedule thereto, all railways belonging to the Province of Nova Scotia, including the railway in suit, passed to and became vested on the 1st of July, 1867, in the Dominion of Canada, but not for any larger interest therein than at that date belonged to the Province.	
The railway in suit being, at the date of the statutory transfer, subject to an obligation on the part of the Provincial Government to enter into a traffic arrangement with the respondent company, the Dominion Government, in pursuance of that obligation, entered into a further agreement relating thereto, of the 22nd of September, 1871.	
<i>Quare</i> , whether it was <i>ultra vires</i> of the Dominion Parliament, by an enactment to that effect, to extinguish the rights of the respondent company under the said agreement.	
But held, that Dominion Act, 37 Vict. c. 16, did not, upon its true construction, purport so to do. And although it authorized a transfer of the railway to the appellant, it did not enact such transfer in derogation of the respondent's rights under the agreement of the 22nd of September, 1871, or otherwise.— <i>Western Counties Railway Co. v. Windsor and Annapolis Railway Co.</i>	397
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DOMINION PROPERTY IN PROV. INCE—Law of Province, effect of.	
Held, following the case of the Commissioners of the Cobourg Town Trust, 22 Grant 377, that the Commissioners of the Toronto Harbour were entitled to compensation for their services, and this whether the harbour belonged to the Dominion or the Provincial Government; as in the event of it being found to belong to the Dominion, it must be assumed that the Dominion Government intended the Commissioners to be subject to the law of the Province in which the trust was to be administered.— <i>Re Toronto Harbour Commissioners</i>	825
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Those "lands reserved for the Indians," which by s. 91, sub-s. 24, of the B. N. A. Act, are placed under the exclusive legislative jurisdiction of the Parliament of Canada, are those Indian lands only which have not been surrendered by the Indians, and have been reserved for their use, and do not include lands to which the Indian title has been extinguished.	
The Ontario Legislature has power to tax against a vendee unpatented lands which the Indians have surrendered for the purpose of being sold; all unpatented lands, whether Indian lands or Crown lands, when once agreed to be sold, being upon the same footing as respects liability to municipal taxation.— <i>Church v. Fen-ton</i>	831
INFORMATION—Proper person to file	813
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INJURY TO PUBLIC—Proper officer to complain of.— <i>Information</i> .	
The Attorney-General of the Province is the officer of the Crown who is considered as present in the Courts of the Province to assert the rights of the Crown, and of those who are under its protection.	
The Attorney-General of the Prov-	

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ince, and not the Attorney-General of the Dominion, is the proper party to file an information where the complaint is not of an injury to property vested in the Crown as representing the Government of the Dominion, but of a violation of the rights of the public of the Province, even though such rights are created by an Act of the Parliament of the Dominion.	
The Attorney-General of the Province is the proper person to file an information in respect of a nuisance caused by interference with a railway.	
Though the power of making criminal laws is vested in the Dominion Parliament, the Attorney-General of the Province is the proper officer to enforce those laws by prosecution in the Queen's Courts of Justice in the Province.— <i>Attorney-General v. Niagara Falls International Bridge Co.</i> . . .	813

#### INSOLVENCY—

— <i>B. N. A. Act, s. 91, sub-s. 21.—Property and civil rights—32-33 Vict. c. 16, s. 50, D.</i>	
Section 50 of the Insolvent Act of 1869, which provided that claims by and against assignees in insolvency might be disposed of by the Judge of the County Court or by the County Court on petition, and not by any suit, attachment, opposition, seizure or other proceeding whatever, was held not to be beyond the power of the Dominion Parliament, because the right to legislate on the subject of bankruptcy and insolvency belongs exclusively to that Parliament, and because, at the passing of the B. N. A. Act there was a system of proceeding in insolvency in force in the former Provinces of Upper and Lower Canada very similar to the one established by the Act of 1869.— <i>Crombie v. Jackson</i> . . .	685
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— 1. <i>Licenses—Stamps—Direct taxation.</i>	
The clauses of the Act 39 Vict. c. 7 (passed by the Legislature of Quebec), which impose a tax upon certain policies of assurance and certain receipts or renewals, are not authorized	

by the B. N. A. Act, 1867, s. 92, sub-s. 2, 9.

A License Act by which a licensee is compelled neither to take out nor pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee, but by the person who deals with him, is virtually a Stamp Act and not a License Act.

The imposition of a stamp duty on policies, renewals and receipts with provisions for avoiding the policy, renewal, or receipt in a Court of Law, if the stamp is not affixed is not warranted by the terms of an Act which authorizes the imposition of direct taxation.—*Attorney-General for Quebec v. The Queen Insurance Co.* . . . 117

— 2. *Matter of Local or private nature in the Province.—Insolvency.*

The Act of the Legislature of Quebec (33 Vict. c. 58), for the relief of the appellant society, then (as appeared on the face of the Act) in a state of extreme financial embarrassment, is within the legislative capacity of that Legislature.

The Act was held to relate to "a matter merely of a local or private nature in the Province," which by the 92d section of the B. N. A. Act, 1867, is assigned to the exclusive competency of the Provincial Legislature; and not to fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the B. N. A. Act reserved for the exclusive legislative authority of the Parliament of Canada.—*L'Union St. Jacques de Montreal v. Belisle* . . . 63

— 3. *Matter of merely local or private nature in the Province.—Direct taxation for local purpose upon a particular locality, power to impose.*

An Act of the Provincial Legislature of New Brunswick (33 Vict. c. 47), intitled "An Act to authorize the issuing of debentures on the credit of the lower District of the Parish of St. Stephen, in the County of Charlotte," which empowered the majority of the inhabitants of that Parish to raise, by local taxation, a subsidy designed to promote the construction of a railway extending beyond the limits of the Province, but already authorized by statute, was held to be within the legislative capacity of that Legislature.

A Provincial Legislature can, under the B. N. A. Act, sec. 92, art. 2, impose direct taxation for a local pur-

pose upon a particular locality within the Province.

The Act in question was held to relate to "a matter of a merely local or private nature in the Province," which, by the 92nd section of the B. N. A. Act, is assigned to the exclusive competency of the Provincial Legislature, and not to relate to a railway or any local work or undertaking within the excepted subjects mentioned in Art. 10, sub-sec. (a) of the said section.

L'Union St. Jacques de Montreal v. Dame Julie Belisle, L. R. 6 P. C. 31, approved.—*Dow v. Black*. . . 95

4. *Prerogative of the Crown to admit appeals*—B. N. A. Act, 1867, ss. 91, 92—*Canadian Act*, 40 Vict. c. 41, s. 28—"Final."

The B. N. A. Act, 1867, s. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, conferred on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as these might be affected by a general law relating to those subjects; consequently the Dominion enactment, 40 Vict. c. 41, s. 28, providing that the judgment of the Court of Appeal in matters of insolvency should be final, i.e., not subject to the appeal as of right to Her Majesty in Council, allowed by the Lower Canada Civil Procedure Code, Art. 1178, is within the competence of the Dominion Parliament, and does not infringe the exclusive powers given to the Provincial Legislatures by sec. 92 of the Imperial Statute; nor does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code.

The section according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and, quare, what powers may be possessed by the Parliament of Canada so to do.

Cuvillier v. Aylwin (2 Knapp's P. C. 612) reviewed.—*Cushing v. Dupuy*. 252

5. *Property and civil rights*—34 Vict. c. 5, D.—*Trade and Commerce—Banking*.

The Dominion Parliament has power to legislate with respect to property and civil rights, so far as necessary for the exercise of its juris-

diction over the subjects assigned to it by the B. N. A. Act.

Per Spragge, C. J.—The Dominion Act, 34 Vict. c. 5, s. 46, which authorizes the transfer of warehouse receipts to banks by direct endorsement, is within the powers assigned to the Dominion Parliament and is valid.—

*Smith v. The Merchants Bank* . . . 828

— Copyright . . . 576  
See COPYRIGHT.

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LEGISLATURES OF ONTARIO AND QUEBEC—Powers of—B. N. A. Act, 1867, ss. 91, 92, 129—*Canada Act*, 22 Vict. c. 66—*Invalidity of Quebec Act*, 38 Vict. c. 64.

The powers conferred by the B. N. A. Act, 1867, s. 129, upon the Provincial Legislatures of Ontario and Quebec, to repeal and alter the statutes of the old Parliament of Canada, are precisely co-extensive with the powers of direct legislation with which those bodies are invested by the other clauses of the Act of 1867.

The Act 22 Vict. c. 66 of the Province of Canada, which created a corporation having its corporate existence and rights in the Provinces of Ontario and Quebec, afterwards created by the B. N. A. Act, could not, after the B. N. A. Act, be repealed or modified by the Legislature of either of these Provinces, or by the conjoint operation of both Provincial Legislatures, but only by the Parliament of the Dominion.

The Quebec Act, 38 Vict. c. 64, which assumed to repeal and amend the said 22 Vict. c. 66, and (1) to destroy a corporation which had been created by the Parliament of the Province of Canada before the B. N. A. Act, and to substitute a new corporation; (2) to alter materially the class of persons interested in the corporate funds, and not merely to impose conditions upon the transaction of business by the corporation within the Province, was held invalid.

Citizens Insurance Company of Canada v. Parsons (7 App. Cas. 96), approved and distinguished.

The first step to be taken with a view to test the validity of an Act of a Provincial Legislature under the B. N. A. Act is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in section 92, which

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- states the legislative powers of the Provincial Legislatures. If it does not come within any of such classes, the Provincial Act is of no validity. If it does, these further questions may arise—viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, which states the legislative powers of the Dominion Parliament, and whether the power of the Provincial Legislature is or is not thereby overborne. *Dobie v. The Temporalities Board* . . . . . 351
- LICENSES—**  
*See* BREWERS' LICENSES.  
 LEGISLATIVE POWER, 1.  
 TAVERN AND SHOP LICENSES.  
 PROVINCIAL LEGISLATURES, 8.
- LIEUTENANT-GOVERNOR OF ONTARIO—**Commissions to hold Courts of Assize. . . . . 722  
*See* PREROGATIVE.
- LIQUOR—**Power to prohibit sale of in shops, etc. . . . . 688  
*See* PROVINCIAL LEGISLATURES, 8.
- LOCAL OR PRIVATE NATURE—**  
 Matter of  
*See* LEGISLATIVE POWER, 2, 3.  
 PROVINCIAL LEGISLATURES, 8.
- MARITIME COURT—**Power to establish in one Province—40 Vict. c. 21, D.  
 The Act 40 Vict. c. 21, D., establishing a Maritime Court, with jurisdiction limited to the Province of Ontario, is within the powers of the Dominion Parliament. *The Picton* 557
- MARKETS—**Power to regulate . . . 756  
*See* PROVINCIAL LEGISLATURES, 5.
- MATTER OF MERELY LOCAL OR PRIVATE NATURE IN PROVINCE.**  
*See* LEGISLATIVE POWER, 2, 3.  
 PROVINCIAL LEGISLATURES, 8.
- MEDICAL PRACTITIONER—**Registration in England—*Refusal to register—B. N. A. Act, s. 93.*  
 The Imperial Parliament having enacted since Confederation that any person registered as a medical practitioner under the English Medical Act (21 and 22 Vict. c. 90), shall be entitled to be registered in any colony upon payment of the fees required for such registration, and that the term "colony" shall include any of Her Majesty's possessions which have a Legislature, the enactment was held to apply to Canada and to override Provincial regulations for the examination of applicants for registration,
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- notwithstanding the Confederation Act and the exclusive power given thereby to the Provinces to legislate in relation to education—*Regina v. College of Physicians and Surgeons, Ontario* . . . . . 761
- MUNICIPAL INSTITUTIONS—**  
*See* PROVINCIAL LEGISLATURES, 5, 8.
- NEW BRUNSWICK STATUTES—**  
*See* STATUTES.
- NOVA SCOTIA STATUTES—**  
*See* STATUTES.
- ONTARIO—**  
*See* LEGISLATURES OF ONTARIO AND QUEBEC.  
*See* STATUTES.
- PARLIAMENT OF CANADA—**  
*See* DOMINION PARLIAMENT.
- POLICE MAGISTRATES—**  
*See* PROVINCIAL LEGISLATURES, 4.
- POWER—**  
*See* LEGISLATIVE POWER.  
 PROVINCIAL LEGISLATURES.
- PREROGATIVE OF THE CROWN**  
*—B. N. A. Act, ss. 12, 65, 91, 92, 96—Provisional District of Algoma—Commission of Oyer and Terminer to District Judge.*  
 The provisions of the B. N. A. Act have not superseded the prerogative right of the Crown to issue a commission to the Judge of the Provisional Judicial District of Algoma to hold a Court of Oyer and Terminer and General Gaol Delivery, for trial of felonies, etc.; and such a commission by the Deputy of the Governor-General was held to be legal.  
 Per Wilson, J.:—The Lieutenant-Governor of Ontario, as well as the Governor-General, has the power to issue commissions to hold Courts of Assize—*Regina v. Amer* . . . . . 722  
 Appeal . . . . . 252  
*See* LEGISLATIVE POWER, 4.
- PRIVATE ACT—**Effect of . . . 777  
*See* PROVINCIAL LEGISLATURES, 7.
- PROPERTY AND CIVIL RIGHTS—**  
*See* INSOLVENCY.  
 LEGISLATIVE POWER, 4, 5.  
 TRADE AND COMMERCE.
- PROVINCE—**Law of . . . . . 825  
*See* DOMINION PROPERTY.
- PROVINCIAL ATTORNEY-GENERAL—**Proper officer to complain of injury to public of Province . . . 813  
*See* INJURY TO PUBLIC.

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PROVINCIAL COURTS—Power of Parliament of Canada to impose new duties upon— <i>Dominion Controverted Elections Act of 1874</i> — <i>Special leave to appeal</i> .	
The Parliament of the Dominion of Canada has power to impose new duties upon existing Provincial Courts, and to give them powers as to matters coming within the classes of subjects over which the Dominion Parliament has jurisdiction, consequently the Dominion Controverted Elections Act of 1874 (Canadian Stat. 37 Vict. c. 10), which confers upon the Provincial Courts jurisdiction with respect to elections to the Dominion House of Commons, is valid.	
Special leave refused to appeal from two concurrent judgments of the Courts in Canada, affirming the competency and validity of the said Act of 1874; it appearing to the Judicial Committee of the Privy Council that there was no substantial question requiring to be determined, none of their Lordships having any doubt of the soundness of the judgments, though several judges of the first instance had held the Act to be invalid. <i>Valin v. Langlois</i> . . .	158
— Precedence in . . .	488
See QUEEN'S COUNSEL.	
PROVINCIAL LEGISLATURE—Act of, Test of Validity of . . .	351
See LEGISLATURES OF ONTARIO AND QUEBEC.	
PROVINCIAL LEGISLATURES—Jurisdiction of	
— 1. <i>Fire Marshals</i> — <i>Appeal in trial for felony</i> .	
By the Statutes of the Quebec Legislature, 31 Vict. c. 32, and 32 Vict. c. 23, Fire Commissioners or Marshals were appointed, with power to investigate the origin of any fires occurring in the cities of Quebec and Montreal; to compel the attendance of witnesses, and examine them on oath; and to commit to prison any witnesses refusing to answer without just cause. Held, that these Statutes were within the competency of the Provincial Legislature.	
On petition by the Attorney-General of the Province of Quebec, special leave was granted to appeal from a judgment of the Queen's Bench, Quebec, on a case reserved in a trial for felony.— <i>The Queen v. Coote</i> . . .	57
— 2. <i>Federal Company</i> — <i>Power to dissolve</i> .	
A Provincial Legislature of Canada has no power to pass an Act transferring to a new company, or other-	

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wise, a federal railway, with its appurtenances, property, rights and powers, or to dissolve a federal company, or to substitute for it a company to be governed by, and subject to, Provincial legislation.— <i>Bourgois v. La Compagnie du Chemin de Fer de Montreal, Ottawa et Occidental</i> . . .	233
— 3. 34 Vict. c. 99, O.— <i>Domicile</i> . A testator had devised the residue of his estate in trust for such of his children as should be living at the decease of his widow, and for the children of any of them who should then be dead. Before the widow's death, and on her application and that of the testator's children (all of whom were living), the Provincial Legislature of Ontario passed an Act (34 Vict. c. 99) for dividing the property among the testator's children forthwith. Held, that such an Act was within the competence of the Provincial Legislature; but the Court held further (Draper, C. J., and Spragge, C., dissenting), that the testator's grandchildren, not having been expressly named in the Act, and there being no express and explicit enactment specifically referring to and barring their rights, their interests remained unaffected by the Act.— <i>Re Goodhue</i> . . .	560
— 4. <i>B. N. A. Act</i> , ss. 65, 137.— <i>Administration of Justice</i> . An Act of the old Province of Canada authorized the Governor to appoint Police Magistrates; the Act was temporary. Held, that an Act of the Ontario Legislature, continuing the same in force, was valid.— <i>The Queen v. Reno and Anderson</i> . . .	810
— 5. <i>Municipal Corporations</i> — <i>Market Regulations</i> . <i>R. S. O. c. 174, s. 466, sub-s. 6</i> . The provisions contained in the Municipal Act of Ontario, authorizing City Councils to pass by-laws "for preventing criers and vendors of small ware from practising their calling in the market, public streets, and vacant lots adjacent thereto," is not <i>ultra vires</i> of the Ontario Legislature, as being a regulation of trade and commerce.	
In giving jurisdiction to the Provincial Legislatures in all matters relating to municipal institutions, the intention must have been that these Legislatures should have power to alter and amend all the existing laws with respect to such institutions, and especially to enlarge the scope of a power existing in the Municipal Act at the time of Confederation.— <i>Harris v. City of Hamilton</i> . . .	756

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6. <i>Power to tax income of Dominion Officer—Assessment law.</i>	
A Provincial Legislature cannot impose a tax upon the official income of an officer of the Dominion Government, or confer such a power upon the municipalities.— <i>Leprohon v. City of Ottawa.</i>	592
7. <i>Private Act, Effect of—Domicile of party affected.</i>	
Provincial Legislatures are not restricted to legislation respecting property such as bonds held in the Province, and where debts or other obligations are authorized to be contracted under a local Act, passed in relation to a matter within the power of the Local Legislature, such debts may be dealt with by subsequent Acts of the same Legislature, notwithstanding that by a fiction of law they may be domiciled out of the Province.— <i>Jones v. Canada Central Railway Co.</i>	777
8. <i>Sale of liquor—Prohibitory by-laws—Powers of Municipal Corporations—32 Vict. c. 32, O.</i>	
Under the exclusive legislative authority given to it with regard to "Municipal Institutions," and to "matters of a merely local or private nature in the Province," a Provincial Legislature can confer on municipal corporations power to pass by-laws wholly prohibiting the sale of spirituous liquors in shops and places other than houses of public entertainment, and limiting the number of tavern licenses; and the conferring such power is not an interference with "the regulation of trade and commerce," assigned exclusively to the Dominion Parliament.— <i>Slavin v. Village of Orillia.</i>	688
— Bill of Lading . . . . .	683
— See BILL OF LADING.	
— Brewers' Licenses . . . . .	414
— See BREWERS' LICENSES.	
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— Separate Schools . . . . .	816
— See SEPARATE SCHOOLS.	

PROVINCIAL RAILWAY crossing Dominion Railway.—Approval required.

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Where it is necessary for a Provincial Railway in Ontario to cross a Dominion Railway, the company desiring to effect such crossing must procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council of the Dominion; and the Railway Companies cannot by agreement waive this provision.— <i>Credit Valley Railway Co. v. Great Western Railway Co.</i>	822

PUBLIC—Injury to, Proper officer to complain of . . . . .	813
— See INJURY TO PUBLIC.	

QUEBEC—	
— See LEGISLATURES OF ONTARIO AND QUEBEC.	
— See STATUTES.	

QUEEN'S COUNSEL—Power of appointment of— <i>Powers of Local Legislatures.</i>	
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A Provincial Legislature has no power to authorize the Lieutenant-Governor to appoint Queen's Counsel, or to grant to any member of the Bar a patent of precedence in the Courts of the Province. (Henry, Taschereau and Gwynne, J.J.)

The question arose on an appeal by Queen's Counsel appointed by the Lieutenant-Governor under Acts of the Provincial Legislature, the Respondent being a Queen's Counsel appointed by the Governor-General; and Strong, Fournier and Taschereau, J.J., were of opinion that the Provincial Acts under which the appellants were appointed were not intended to affect the precedence of Queen's Counsel appointed by the Governor-General; and it was therefore held,

Per Strong and Fournier, J.J.:—That as this Court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question.—*Lenoir v. Ritchie.*

RAILWAY—	
— See DOMINION PARLIAMENT.	
— INJURY TO PUBLIC.	
— PROVINCIAL LEGISLATURES, 2.	
— LEGISLATIVE POWER, 3.	
— PROVINCIAL RAILWAY.	

REGISTRATION . . . . .	761
— See MEDICAL PRACTITIONER.	

# SEPARATE SCHOOLS—Legislation respecting—*B. N. A. Act, s. 93.*

A Provincial Legislature may legislate in regard to Separate Schools, provided that the rights or privileges with respect to denominational schools which any class of persons had by law in the Province, at the time of Confederation are not prejudicially affected by such legislation.

The *B. N. A. Act* provides by sub-s. 3 of s. 93 that "Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education:" Held, that this enactment gives an appeal in respect of those decisions alone which are legislative acts, or their equivalents, and not in respect of matters affecting merely the every-day detail of the working of a school.

In election matters, Separate Schools have the same right of appeal to a County Judge as Public Schools have.—*Separate School Trustees of Belleville v. Grainger* . 816

# SHOP, SALOON, TAVERN, AUCTIONEER, AND OTHER LICENSES—

See BREWERS' LICENSES.

PROVINCIAL LEGISLATURES, 8.

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SMALL WARE—Vendors and Criers of—Regulation of . 756

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# STATUTES—

*Imperial* . 22 Geo. 3, c. 75 . 789

5 & 6 Vict. c. 45 . 576

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34 Vict. c. 99 . 560

36 Vict. c. 10 . 709

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39 Vict. c. 24 . 265

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R. S. O. c. 174 . 756

R. S. O. c. 181 . 742

*Quebec* . 31 Vict. c. 32 . 57

32 Vict. c. 29 . 57

33 Vict. c. 58 . 63

38 Vict. c. 62 . 351

38 Vict. c. 64 . 351

39 Vict. c. 2 . 233

39 Vict. c. 7 . 117

*Nova Scotia* . 37 Vict. c. 20 . 488

37 Vict. c. 21 . 488

*New Brunswick* . 30 Vict. c. 54 . 95

33 Vict. c. 47 . 95

# TAVERN AND SHOP LICENSES

—*B. N. A. Act, s. 91, sub-s. 27; s. 92, sub-s. 9, 15, 16—Criminal law.*

The Legislature of Ontario having passed an Act to regulate tavern and shop licenses: Held, that they had power to enact that any person who, having violated any of the provisions of the Act, should compromise the offence, and any person who should be a party to such compromise should on conviction be imprisoned in the common gaol for three months; and that such enactment was not opposed to sec. 91, sub-s. 27, of the *B. N. A. Act*, by which criminal law is assigned exclusively to the Dominion Parliament.—*Regina v. Boardman* . 676

# TAX ON POLICIES OF INSURANCE—Power to impose . 117

See LEGISLATIVE POWER.

TAXATION—Lands liable to . 831

See INDIAN LANDS.

—Power to impose on a particular locality . 95

See LEGISLATIVE POWER, 3.

—Officer of Dominion.

See PROVINCIAL LEGISLATURES, 6.

# TRADE AND COMMERCE—Regulation of.—Property and civil rights

—*Fire Insurance contracts, regulation of.*

The power of the Dominion Parliament for the regulation of trade and commerce includes political arrangements in regard to trade, and regulations of trade in matters of inter-pro-



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vincial concern, and may, perhaps, include general regulations affecting the whole Dominion, but it does not comprehend the power to regulate the contracts of a particular business or trade (such as the business of fire insurance) in a single Province.

An Act of the Province of Ontario to secure uniform conditions in policies of fire insurance was held to be within the power of a Provincial Legislature over "property and civil rights."

Such an Act, so far as relates to insurance on property within the Province, may bind all fire insurance companies, whether incorporated by Imperial, Dominion, Provincial, Colonial or Foreign authority.

A Dominion Act having required insurance companies to obtain licenses from the Minister of Finance as a condition to their carrying on the business of insurance in the Dominion,

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neither the Act, nor the fact of a company having obtained such license, was held to withdraw the company from the operation of the Provincial Act.—*Citizens and Queen Insurance Companies v. Parsons* . 265  
— Bill of Lading . . . 683  
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